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IN THE
S U P E R I O R C O U R T
AND
C O U R T O F E R R O R S A N D A P P E A L S
OF THE
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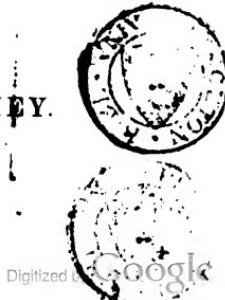
PUBLISHED AT THE REQUEST OF THE GENERAL ASSEMBLY.

By SAMUEL M. HARRINGTON,
ONE OF THE JUDGES OF THE SAID COURTS.

State decisio.—LEG. Max.

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R E P O R T S.

THIS Volume contains the adjudged cases from the June Term, 1843, to the Fall Sessions, 1847, inclusive; during which time the Court consisted of

Hon. KENSEY JOHNS, JR., *Chancellor.*

Hon. JAMES BOOTH, *Chief Justice.*

Hon. SAMUEL M. HARRINGTON, *Associate Judge.*

Hon. CALEB S. LAYTON, *Associate Judge;* resigned July 22, 1844.

Hon. JOHN J. MILLIGAN, *Associate Judge.*

Hon. DAVID HAZZARD, *Associate Judge;* appointed Dec. 10, 1844: resigned Sept. 10, 1847.

Hon. EDWARD WOOTTEN, *Associate Judge;* appointed Sept. 16, 1847.

EDWARD W. GILPIN, Esq., *Attorney General.*

COURT OF ERRORS AND APPEALS.

JUNE TERM,

1843.

WILLIAM H. JONES, et al. *compl'ts below, appl't's vs.* DAVID BUSH,
P. WEYANT, H. MOORE, J. RUSH, E. PENNEL, D. HARTLEY,
et al. *resp'ts.*

A deed executed with the usual formalities, acknowledged by the grantor before a judge, and put on record by the grantor's orders, held void for want of *delivery*; it being clearly proved that the deed never was delivered in fact, and that it never was the grantor's intentions to deliver it, only on a contingency that never happened. A complainant in equity cannot have relief as on a case not stated by his bill. Under the general prayer, other relief may be decreed than that specifically sought; but it must be consistent with the case presented. A deed to A. B. and C. their heirs, &c., *in trust* for the only proper use of the grantors during life, and then for the use of their grand-children, conveys the legal estate as *an executed use*, in the cestuis que use, and is not a *trust estate* in the grantees.

APPEAL from the decree of the chancellor. Before all the law judges.

The bill stated that Isaac Jones, of Wilmington, the grand-father of complainants, on the 18th of January, 1826, for the purpose of settling his estate and making provision for his family, and being seized of a large real estate in Delaware and elsewhere, did *make, execute* and *deliver*, a certain deed, whereby for the consideration of one dollar, he granted and conveyed unto David Bush, William Larkin and William Keay, their heirs and assigns, in trust to and for the uses thereafter declared, certain tracts of land, &c., "to have and to hold the same unto the said B. L. & K., their heirs and assigns *in trust*, for the only proper use and behoof of the said Isaac Jones and Sarah his wife, for and during their natural lives and the life of the survivor of them, and upon the decease of the survivor of them, then to and for the only proper use, behoof and benefit of all the children which the said Isaac Jones' son, Isaac H. Jones, then had, or thereafter should have, as tenants in common in fee simple, their heirs and assigns forever; subject, however, to the pay-

ment of \$1,000 to each and every of the children which the said Isaac Jones' son, John C. Jones, then had or thereafter might have as follows, &c. &c., and to each of the children of the said Isaac Jones' deceased daughter, Deborah, in the same manner as to the children of the said John C. Jones, and for no other use, intent or purpose whatever;" which said deed was afterwards duly *acknowledged* and *recorded*: that it is in the custody or control of defendants, or some of them, who refuse to produce it. Isaac Jones died on the 29th December, 1829, no re-conveyance or re-transfer of the property embraced in the deed, having been made to him. Sarah Jones, his wife, died before him. At the time of his death and at the filing of this bill, John C. Jones had four children, (the plaintiffs being two of them.) Isaac H. Jones had three children at that time, two of whom, and the representatives of the third, are defendants. William Larkin and William Keay, two of the grantees in the deed, died in 1829, before the death of Isaac Jones, the grantor. David Bush declined acting as trustee after Isaac Jones' death; and the property went into possession of Weyant, Moore and others, (defendants) as grantees of Isaac H. Jones, who took possession as devisee under an alleged will of Isaac Jones; Isaac Rush, Pennel, Hartley and the other defendants, are claiming as grantees from John C. Jones, claiming that Isaac Jones died intestate, and denying both will and deed.

The bill prayed that the said deed may be established, and the trusts thereof performed and carried into execution by the decree of the court of chancery; that the said David Bush may be compelled to refuse or accept the trust, and in case of his refusal, to convey the legal estate in the property conveyed by said deed, to such trustee as the court may appoint, that the money due complainants under said deed, may be decreed to be raised out of the property thereby conveyed, and for further relief.

The answers admitted the making and execution of the deed, of 1826, but denied that it was ever *delivered*, its intent being solely to avoid certain liabilities supposed to be incurred by the said Isaac Jones for his son, Isaac H. Jones, (who was his partner as a tobacconist, and who was supposed to have given the notes of the firm in certain gambling lottery ventures) and to protect his property against his said son's creditors; for which same purpose he executed a deed to Thomas R. Tunis for his Philadelphia property, which was afterwards reconveyed to him. Isaac Jones always considered said deed as a mere form, made for the purposes aforesaid, and so declared to

the trustees ; it was kept in his possession, and never was in the possession of, or seen by, either of the grantees, who never accepted the trust, or agreed to act under it : none of the persons named or alluded to in it, were present at its execution. Isaac Jones always remained in possession of the estate, and the real objects of the deed were avowed and well understood by all the parties interested. The deed is not in the possession of these defendants, but of one of their counsel, and they do not know how or from whom he got it.

The answer of David Bush, alledged that the deed was never delivered to him, and he never accepted the trust. He believes it remained in the possession of Isaac Jones, who told him he made it for fear of certain liabilities in which his son Isaac H. Jones might have involved him, and to meet that contingency ; and it was mere form ; and he afterwards told this defendant that the difficulties had not occurred, and the deed was of no effect.

The other defendants denied the execution and delivery of this deed, and pleaded that they are purchasers from John C. Jones, for a valuable consideration without notice.

The chancellor decreed dismissing the complainants' bill.

Extracts from the depositions:—

Isaac H. Jones.—The deed was found in possession of Archibald Hamilton, Esq., after the death of Isaac Jones. William Keay was more intimate with Isaac Jones than Bush or Larkin. Has heard William Keay say, this deed was all a sham. Heard Isaac Jones say, this deed was made for the purpose of securing his property from attachment.

John Elliott.—Bush, Larkin and Keay, were intimate friends of Isaac Jones, Keay the most intimate. Has heard Mr. Hamilton say, he had the deed.

Matthew Kean.—Isaac Jones himself handed this deed to me as recorder, to be recorded, and took it away with him again.

Jonas P. Fairlamb.—Was employed by Isaac Jones to write the deed of trust to Bush, Larkin and Keay, and is the subscribing witness. At the time it was signed it was not delivered, nor do I know that it was ever delivered. I kept it at Jones' request, and for him, for a month or more, and then gave it to him, or left it in the recorder's office to be recorded. At the time of signing the deed, Isaac Jones declared he made it to prevent Pennsylvania creditors of his son from getting his property, but did not say he should retain the deed ; and I can't say that he declared the deed was not to be used for any other purpose. He often made this declaration before and after the signing,

as well as at the time the deed was executed, as deeds usually are, when but one party is present, the grantor saying; that he signed, sealed and delivered the the deed for the purposes therein mentioned.

David Bush.—The deed was never delivered to me or to Larkin and Keay, that I know of. Isaac Jones applied to me, to suffer my name to be inserted in a deed of trust, with L. & K., to secure his Delaware creditors against certain Pennsylvania creditors. Jones promised we should have no trouble. I consented that my name should be used, but never acted under the trust, and never saw the deed; and do not know that L. or K. ever did. Jones told me afterwards that "he had his business settled, and it was all right."

Clayton and Bates, for appellants contended:—1st. That the deed from Jones and wife, to Bush, Larkin and Keay, was not a *trust* deed, but an *executed use* conveying the legal title to the cestuis que use, by force of the stat. of uses. (3 *Law Lib.* 24; *Corn. on Uses* 56; 20 *Law Lib.* 49; *Watk. Con.* 142; 24 *Law Lib.* 52; *Lew. Tr.* 102.)

The very object of the statute of uses (27 Hen. 8,) was to execute such a use as this. Modern trusts have grown out of the statute by evasion of it, and no use can operate as a trust that does not avoid the statute. A trust cannot be created without raising a use in the trustees first, and then in the cestuis que use, that is a use on a use; for the statute always executes the first use, no matter what the intention of the party making it. (1 *Cruise* 411, 453, 460, 165; 2 *Blac. Com.* 333; 2 *Salk.* 679, *Broughton vs. Langley*.)

Under this deed, Isaac Jones and wife, the grantors, took an estate during their joint lives, and the life of the survivor, with a vested remainder in all their grand-children then in esse; and as to any other children of Isaac H. Jones and John C. Jones, it was a contingent use, dependent upon their coming into existence during the life time of their fathers. The first estate in Isaac Jones and wife, the grantors, is not merely a joint estate, but an anomalous estate peculiar to husband and wife, who are seized in entireties each *per tout* as well as *per my*, which neither can sever. Bush, Larkin and Keay the nominal trustees; took nothing, they were the mere conduit pipes, "the lightening rods" through which the legal estate passed instantaneously into the cestuis que use.

Isaac H. Jones, and wife being thus seized of the legal estate under their own deed, there was no necessity for a formal delivery of the deed to Bush, Larkin and Keay, in order to its validity. The retaining possession of it by Isaac Jones himself, so far from being evidence of non-delivery is consistent with the full operation of the

deed; for it was properly in his custody as one of the grantees, to use.

The deed operated, and was so intended, as a family settlement, made by Isaac Jones, and completed as fully as he could complete it, signed, sealed, admitted to be delivered, acknowledged and recorded; but retained in his possession, because he was entitled to it: which is evidence of the delivery.

A voluntary deed in favor of younger children, without a power of revocation, cannot be revoked even by will. (*Sear vs. Ashwell*, 3 *Swanst. Rep.* 411, 412; *Bolton vs. Bolton*, *Ib.* 414, 415; 2 *Vern.* 402; *Clavering vs. Clavering*.)

If this were a *trust* deed, as it has heretofore uniformly been considered, it was fully executed and is valid. The acknowledgment and recording of a deed, is not only *prima facie* evidence, but conclusive evidence of delivery. (16 *Peters' Rep.* 106, 118, *Tompkins vs. Wheeler*; 30 *Law Lib.* 122; *Shep. Touch.* 57-8; 3 *Swanst.* 411-12; 5 *B. & Cress.* 671; *Dig.* 90, sec. 2; 2 *Harr. Rep.* 200. The act of recording, put the deed in the custody of the law, for purposes inconsistent with any idea that it was not a perfect deed; and to that extent out of the grantor's power. The record is evidence of the delivery without other proof.

The facts that prove the delivery and the intention that it should operate are—1st. Jones consulted Bush, and obtained his consent to act as trustee. 2d. He procured the deed to be drawn and signed, sealed and said he delivered it as his deed for the uses and purposes therein mentioned. 3d. He acknowledged it as his deed, before judge Way. 4th. A month after, he had it recorded as his deed, and without qualification, and 5th. It was afterwards found out of his possession, among Mr. Hamilton's papers.

Rogers, jr. and Wales, for the appellees contended:—1st. That this was not an executed use, but a special trust excepted out of the statute, and which it will not execute; as among other things for raising these annuities. (*Lew. on Trusts*, 53.)

2d. The position that this is not a trust deed but an executed use, is a new case, not made by the bill nor in the argument below; and the appellants have no right to such relief. The bill states a case of *trust*; claims that Bush et al. are *trustees*; prays the execution of the trust, and a conveyance of the trust estate by Bush. No relief can be had under the general prayer, unless consistent with the case made by the bill. (2 *Harr. Rep.* 400, *Kibler's Adm'r. vs. White*

man's Ex'r.; 3 Ibid 139, Bayard vs. McLane; 2 Mad. Ch. 171; 12 Vesey, 47-8.)

3d. The relief now sought is not the subject of equity jurisdiction. The case now made, is that of a legal estate in the grandchildren of Isaac Jones subject to the legacies of complainants. The demand is a legal one, and should be enforced at law. (1 Mad. Chy. 445-7-50.)

4th. This was never the deed of Isaac Jones for want of delivery. However it is to operate, it cannot be his deed without delivery, nor this without his intention. The proof is full that he never intended to deliver it; that it was prepared for a special purpose, for which it was never required. If it had even been delivered for this purpose, it could not be set up for any other. (2 Atk. 257.) There was no delivery, and no intention to deliver the deed. The formal execution and acknowledgment before the judge, though *prima facie* evidence of delivery, are fully explained. The recording has no effect to strengthen the execution if that is defective; it is the act of a ministerial officer; and, indeed, a lawful act only, after a complete execution and delivery. The record is *prima facie* evidence without proof of execution, but not against proof of non-delivery. (10 Mass. Rep. 462; 12 Ib. 456; 13 Conn. Rep. 192; 9 East 360; 1 Harr. & Gill. 175, 181; Pet. C. C. Rep. 188-9; 6 Cow. 619; 2 Wend. 317; 6 Pet. Sup. C. R. 598, 605; 10 Ibid 596; 2 Harr. Rep. 197, 501.)

5th. This is no deed of settlement, being for only a part of Jones' estate, and for an avowedly different purpose. As a settlement deed it would be ineffectual without full proof of execution; and, on such proof if the party kept possession of the deed, *intending to control* the dispositions in it, he may revoke it. The case of *Clavering and Clavering*, has been much restrained. (1 P. Wms. 577; 2 Ibid 359.) The court never carries into execution a voluntary instrument of conveyance for the benefit of children imperfect in itself. There must be proof of a complete instrument. (1 Johns Ch. Ca. 240; 3 Swanst. 411; 12 Com. L. Rep. 351; 12 Chy. Rep. 39 *Antrobus vs. Smith*.)

Frame, in reply.—1. The trusts of this deed are not special. The money is not to be raised by the trustees, but the land is conveyed subject to the legacies. The wife's estate is not such unless vested in the trustee for her separate use. It is a plain conveyance of the land to B. L. and K., in trust for the *cestuis que use*, and this is an executed use and not a trust. (Lewen on Trusts 103-53; 1 Cruise 165; 2 Ld. Ray. 873-8.)

2. This is not a new case, but a new aspect of the old case. It

is fully embraced within the relief sought. The particular operation of the deed is of no consequence to these complainants, and they are not bound to plead it with technical accuracy. Whether a trust deed or a deed passing the legal estate under the statute of uses is indifferent to their claim, which is for the legacies charged on the land so conveyed. No matter what the deed is called by the pleader, the court will name it and give it effect according to its legal force.

3. There is no adequate legal remedy for these legacies. Supposing assumpsit would lie against the holders of the land charged, how could the amount be apportioned? If that were possible it would not exclude the remedy in equity, which has peculiarly the jurisdiction of sums charged on land. Nor are we bound to pursue a personal remedy constantly shifting; we may come here to enforce the charge against the land. And we are here also for a discovery and production of the deed.

Chief Justice Booth delivered the opinion of the court.

Booth, Chief Justice.—The complainants' case as presented by the bill, seeks to establish this deed as a *trust* deed, and to have the *trusts executed* by David Bush, the surviving trustee, or by some other person to be substituted in his place, for the purpose of raising the money charged on the land so conveyed in trust for the benefit of complainants who are children of John C. Jones. The bill prays this relief specifically. The answers were designed to meet this case and no other. They deny the trust. Upon the case thus presented below the chancellor decreed, dismissing the complainants' bill, upon the ground that no trust such as a court of equity will execute, had been established. On the appeal, the complainants make an entirely new case; abandoning the whole ground taken by them below, denying the trust altogether, and claiming a relief certainly not prayed by the bill, unless it can be granted under the general prayer. On this ground alone we think we should have to affirm the chancellor's decision, dismissing the bill.

2d. But whether this deed was a trust deed or an executed use under the statute, its delivery to the grantees was equally necessary; and the *intention* to deliver was equally necessary in the one case as the other. The delivery of a deed is a question of intention, and all the formalities of signing, sealing, acknowledging and even recording are subject to this intention, when made clearly to appear. Now although Isaac Jones executed this deed in the usual manner, acknowledged it, and had it recorded, it is clearly proved that he never intended to make it his deed, except under a certain con-

tingency that never happened. The proof does not leave this in any doubt.

This also is an application to a court of equity, to enforce a deed for a purpose entirely opposed to the intention of the person whose deed it is alledged to be; and to make it a deed, though it clearly appears to us that the party never intended it should be his deed, except in circumstances which never in fact happened.

On both these grounds we affirm the decree of the chancellor, dismissing the complainants' bill, with costs.

Decree affirmed.

Clayton, Bates, Frame and Comegys for appellants.

Wales and Wm. H. Rogers for appellees.



CALEB S. LAYTON, plaintiff in error *vs.* THE STATE for the use of William Hazzard and wife, defendants in error.

A. by will directed his personal estate to be divided equally between his three children "when they arrived to the age of maturity." Administration with the will annexed was granted, and bond given more than six years before the youngest child came of age. An act of limitation was passed, barring suits on such bonds in six years from their date, but providing that if the person entitled to an action was under the disability of *infancy* or *coverture* at the time of the accruing of the cause of such action, that act should not be a bar to such action during the disability, nor for three years after. Held, that the action of the legatee, brought within three years after attaining full age was not barred.

The legatee married during infancy, and was under *coverture* when she attained full age. Held that a suit brought by husband and wife for the wife's right was not barred.

It seems that an act of limitation which takes away a remedy on a contract before the right of action accrues is unconstitutional.

WRIT OF ERROR to the Justices of the Superior Court in Sussex county.

Coram, JOHNS, JR., Chancellor, MILLIGAN, Justice, and Wm. H. ROGERS, a judge ad litem in place of Judge LAYTON.

The case came up on a writ of error to the judgment of the Superior Court in Sussex county, in an action of debt on an administration bond, dated 11th January, 1826, at the suit of the State for the use of Wm. Hazzard and wife, a legatee of John Wilson, dec'd., against Caleb S. Layton, who was administrator of the said John

Wilson. (See *ante* 469.) The defendant in the action below craved oyer of the bond, set out the condition, which was in the usual form, and pleaded among other pleas, payment and a set-off for necessaries furnished plaintiff's wife before marriage, and the act of limitation. Issue on the pleas of payment, &c., and, as to the plea of limitation, replication that the said John Wilson, dec'd., by his said will dated, &c., duly proved, &c., did devise that his estate after payment of legacies, should be equally divided between his son David, James and Elexine Wilson, "when they arrive to the age of maturity;" that said Elexine married plaintiff 9th of January, 1834, that she arrived at maturity on 22d of June, 1840, and that this suit was brought within three years after, &c. Demurrer to this replication and joinder.

The Superior Court, after argument, overruled the demurrer, and gave judgment for plaintiff.

Ridgely, for plaintiff in error.—The replication to the third plea is defective. 1st. Because it does not aver that the three children had arrived at age. 2d. Because it does not aver that assets came to the defendant's hands applicable, &c.

Every plea must stand by itself and cannot be supported by any other unless by express reference it adopt the other. 1 Ch. Plead. 448, 290, [397;] 382, 444, [618.] The demurrer, therefore, ought to have been allowed, and there was error in overruling it.

2d. But the important question arises on the plea of the act of limitation, supposing this replication proper in form. This is an action on an administration bond brought more than six years from its date. The act of limitation is pleaded, and the question is whether it applies. *Dig.* 397, sec. 1 provides, that no action shall be brought on any administration bond after the expiration of six years from the date of such bond. Sec. 2 bars suits on guardian bonds after three years from the ceasing of the guardianship. Sec. 5 bars actions of trespass or on the case after three years from the accruing of the cause of action. Sec. 6 provides, that if the person entitled to any action within either of these sections shall have been at the time of the accruing of the cause of such action under disability of infancy, **coverture**, or incompetency of mind, this act shall not be a bar to such action during the continuance of such disability, nor until the expiration of three years from the removal thereof.

The disability protected by Sec. 6, is a personal disability, and not intended to apply to any other than the person under such disability. William Hazzard was not under any disability of infancy, and can-

not take advantage of his wife's disability of coverture. This is his suit and not the suit of the wife. It is his suit to reduce the wife's chose in action into possession: so far it is a suit against her interest, and his suit is not protected. *Shankland's case; State use of Hazard and wife vs. Wilson's adm'r.*, ante 348; *Cro. Car.* 200; *3 Barn. & Ald.* 474; *Com. Dig.* 635, tit. *Att'y.* 17; *Dyer* 377, a.; *2 Brown's Ch. Cases* 345; *Co. Litt.* 246, 403; *2 H. Blac.* 584; *2 Inst.* 518; *1 Leonard* 211; *1 Saund.* 120, 121; *1 Blac. Com.* 442; *2 Leigh N. P.* 1082.) Infancy is a personal privilege of which no other person can take advantage. (*4 Esp. Rep.* 187; *1 Chitty's Blac.* 466, n.; *Bal. Lim.* 207-8-9, 317-15.)

3. A testator cannot by his will repeal the general law of limitation. If he postpones payment of a legacy for twenty years, can it be contended that the legatee might sue the administration bond after the lapse of twenty years, when the law says no such suit shall be brought after six years from the date of the bond? (*1 Law Lib.* 12; [*Blanch. Lim.* 23.] *1 Law Lib.* 20; [*Wilkinson* 38,] *1 Law Lib.* 1, 2, 3, 4; [*Blanch* 1, 2, 3, 4,] *Wilkinson* 12, 13; *1 Wm. Blac.* 287; *4 T. Rep.* 309, 517; [*Dwarris* 690, 694, 756, 703,] *10 Mod.* 24; *6 Barn. & Cress.* 712; *10 Ibid.* 52; *Balantine on Lim.* 178, 207, 209; *3 Bing.* 196; *8 Barn & Cress.* 104, 164; *Dwarris* 710, 718.)

4. It does not appear by the verdict in this case that the damages were assessed on occasion of the breaches assigned. (*Dig.* 77.)

5. The 3d and 4th breaches are defective in substance. The will provided that the legacies should be paid when the three children came of age, and plaintiff does not show a cause of action, without averring that David and James, as well as Elexine, had attained full age.

Houston and Wootten, for defendants in error.—The meaning of the will is not that payment of any portion of the estate should be postponed until all three of the children should arrive at age; but that the share of each was payable upon his or her coming of age. This has always heretofore, been the undisputed construction of the will, and the administrator acted on this construction by paying each as they came of age. It was not necessary then for us to make any averment that David and James Wilson had come of age. The right of action of Mrs. Hazzard, accrued on her coming of age. The money then being payable only on her arriving at age, her cause of action did not accrue during infancy, but only on her attaining majority; and in this respect, this case differs from the case of *Hazzard and Layton*, on appeal from the Orphans' Court, which has been cited here, and in which a majority of the court de-

cided that the act of limitations was a bar, and the replication of infancy of Mrs. Hazzard, did not prevent the bar of the statute.

That decision was on the ground that William Hazzard had had three years within which he might have filed his exceptions, and there was no reason to save him from the bar of the statute on the protection of his wife's infancy. But in this case Mrs. Hazzard never could bring suit. She does not seek protection in this case on the replication of infancy, to the plea of the statute, but on the special replication showing that the cause of action, did not accrue until three years of commencing suit.

The question then is, does the act of limitation bar such a claim as this? We maintain that it does not. 1st. The acts of limitation do not apply to cases not coming within their purview. A thing within the letter of the statute is not within the statute, if not within the object and meaning. (9 *Law Lib.* 34, 41-3-4 46, 48, 50, 57, 77, 79, 80.) On these principles, the court will construe the act of limitations reasonably, having in view its objects; but still not oppressively, and not to the absurd extent of making it prevent instead of limiting the action. Its object is to compel persons having a right of action, to exercise that right within a limited time. And where the construction is doubtful, the court may regard the consequences in fixing a construction. (*Dwarris on Stat.* 1 *Harr. Rep.* 77, *Jones vs. Wootten*; 2 *Harr. Rep.* 184, *Luby vs. Cox.*) Any other construction of this act will make it unconstitutional and void under the constitution of the United States. (Art. 1, sec. 10.)

The bond was executed in 1826. The act of limitations was passed in 1839. This bond is a contract. (1 *Harr. Rep.* 102, *Bishop vs. Wild's adm'r.*) The obligation is that which the contract binds the party to do. The obligation of a contract is one thing, the remedy another, the one cannot be touched, the other may be limited. But the remedy cannot be taken away before it accrues, without violating the obligation. For without some remedy, some power to enforce the contract, there is no obligation.

By the very terms of this contract it was executory, and could not be performed within ten years. The defendant bound himself by that contract to pay Elexine Wilson, when she attained maturity; but thirteen years before she arrived at age, the legislature passed an act of limitation, which by the construction of the other side barred all action on that contract in six years after its date; that is, took away all the remedy before it arose. Such a law would be unconstitutional. (3 *Story's Com.* 250, 256, 264-5, 268.)

The act of limitations with their construction, is void by the constitution of the State of Delaware. The contract of defendant, bound him to pay to Elexine Wilson a sum which has since been ascertained to be \$3,109 84, when she came of age, her right to it was vested under the contract, but her remedy did not arise until majority. A law passed in the mean time, taking away her remedy entirely takes away her property without compensation, and is void under the constitution of Delaware, as well as under the constitution of the United States. (*1 Harr. Rep. 81, Jones vs. Wootten.*)

Frame in reply:—The case has been argued as if this was the case of an infant suing for a legacy left her by her father, and the trustee is setting up a defence of the act of limitations, to defeat *her* right. It is no such case. This is not *her* suit. It has been decided by this court that it is not *her* suit. It is the suit of William Hazzard, nay not William Hazzard, but of his creditors, who are seeking to get possession of Elexine Wilson's property, placed under this defendant's protection, and to take it from her forever. If there were any thing of moral consideration entering into this cause in this court, it would be difficult to show the immorality of this trustee availing himself, and shielding Elexine Hazzard, by an undoubted legal defence. Whenever Mrs. Hazzard shall be discovered and in a condition to be benefitted by a recovery of this claim, it will be time enough to call on this defendant and his sureties to waive a legal defence for the sake of a moral duty.

The plaintiff's assume that the cause of action did not accrue until after Mrs. Hazzard attained maturity, and then not seeking protection under the 6th section of the statute, which refers only to causes of action accruing *during* the disability of infancy, &c., they take the broader grounds, 1st. That this case is not within the purview of the statute, and therefore not within its limitation. 2d. That if it is, the statute is unconstitutional.

The 1st section plainly declares, that no action shall be brought on any administration bond after six years. The 12th section as plainly declares that it shall apply to bonds theretofore taken as well as those taken thereafter. The 6th section excepts all the cases which the legislature intended to except out of the statute, and that does not include the case of a debt not falling due within the six years, as an exception. If the legislature intended to except such a case they would have done it, for the case is not so uncommon, but that they must have considered it. Their exceptions all have reference to disabilities of the person, and not disabilities connected with

the debt itself. (*Blanch. Lim.* 23; 12 *Strange* 1257.) And there is reason why such a debt should not be protected ; for sureties could not be got in administration bonds, if the time of liability was extended so indefinitely.

Is the act unconstitutional ?

In respect to contracts arising after the law, I do not understand that its constitutionality is controverted ; for independently of it being a law effecting remedies, it could be defended even though it prohibited all such contracts. The position is that in this case, it is unconstitutional by reason of its retrospective operation on this contract, which had been made before the law. The act does not impair the obligation of the contract. 1st. Because it is a law referring to the remedy under the contract, and not to its obligation. 2d. Because the law of the remedy was not changed by the act of limitation of 1829. The act of 1766 and the exceptions are the same, or quite as liberal. (1 *Del. Laws* 424 sec. 14). The later law, was a mere revision of the act of 1766, which was re-enacted in the course of the general revision in 1829. The law of the remedy, is the gift of the legislature and within their control ; and no one certainly can be injured either as to right or remedy, by a revision of a law, when the new law leaves both precisely as they were under the old. (3 *Story's Com.* 250-1.) But if the change of remedy in 1829, was a matter to be complained of, it could be only by the parties to the contract, who were the State on the one side for the use of Elexine Wilson, and the defendant and his sureties on the other. William Hazzard married Elexine Wilson long after this, and the rights which he derived by the marriage, were merely derived by the law of 1829, subject to the control of the same law. And if the legislature had entirely taken away the remedy on the bond, they would not have taken away *all* remedy ; for there still existed by law the action of debt or assumpsit at law, and the remedy in a court of equity. (Dig. 228. 370.)

The protection of disability of infancy and coverture is personal to the wife and cannot enure to the benefit of the husband. By marriage the legal existence of the wife ceases, and becomes merged in the husband. She can do no act. This can be, therefore, in no sense the wife's suit. (1 *Blac. Com.* 142, 442.) As to a large portion of the wife's property, marriage operates as an absolute gift to the husband, he takes it by purchase in derogation even of the wife's right. (2 *Kent Com.* 135.) So in regard to choses in action, the marriage equally makes them the property of the husband, if he, not

she, shall reduce them to possession during the marriage. It is not the suit of the wife, because it is not to recover any thing *for* her: not for the right of the wife *per se*, but for a right of the husband, his by the marriage, even against the wife. It is no more her suit than the suit of an assignee who has to name the assignor to derive title through him, is the suit of the assignor. Then if this be the suit of the husband, it follows that the exception of the statute which is personal to the party under disability, can never apply to him.

The verdict and judgment are general; and if *any* of the issues are erroneous, the verdict is erroneous. The third and fourth *breaches* are defective. They show that by the will the money was not payable until all three of the children came of age, and there is no averment that they had all come of age. The condition of the bond is not followed; there is no averment that the register had by decree limited and appointed any sum to be paid. And these defects are not cured by the verdict. (*Ch. Pl. 402; 8 Del. Laws 43.*)

By the Court.

JOHNS, JR., *Chancellor*.—In the argument of this case it appears the counsel for the plaintiff in error consider the claim for which the judgment was rendered, could not be recovered by action on the administration bond, because six years had elapsed from its date before suit brought, and the party entitled to the amount of the judgment, relies upon the sixth section of the act of limitations, and especially the words thereof, that “this act shall not be a bar to such action during the continuance of such disability” as excluding the action brought by husband and wife, from the operation of the act during coverture. It has been said the court in rendering the judgment in this case, proceeded upon a construction of the sixth section, different from that which they had given to the eleventh section of the same act. The eleventh section provides, “that the limitation in respect to any person under disability of infancy, coverture, or incompetency of mind, at the time of settlement of such account, shall begin to run from the ceasing of such disability, and not from the time of settlement.” It has been conjectured that the peculiar phraseology of the sixth section, relative to actions, was adopted to avoid the effect of the decision of the High Court of Errors and Appeals, in Shankland’s case, by which it was adjudged that the husband was not within the saving clause of the former act of limitation.

The uniform current of decisions in England as well under the

statute of fines, as that of 21 Jac. 1, having restricted the husband's right of action within the limits allowed after disability, and regarded the statute as commencing to run against the husband from the time of marriage and accruing of the cause of action, when there existed a party to be sued and a jurisdiction competent to decide, and our own State courts having hitherto adopted and adhered to the same rule of construction, it is proper that the subject should be well considered before venturing upon a change.

The difficulty that has occurred in adopting a uniform rule of construction for the 6th and 11th sections of our act of limitations, appears to have resulted from the verbal variation. It has been supposed that the words of the 6th section which declare, that "this act shall not be a bar to such action," are intended to have a different effect from those of the 11th section, which expressly provide "that the limitation as to any person shall begin to run from the ceasing of such disability:" as if the saving in the former applied to the action, and the latter to the person and not the right of suit.

The embarrassment evidently, was occasioned by allowing particular words undue weight, without a sufficient regard to the design and intent of the act as one of limitation. Similar doubts arose upon the English statutes of limitation in consequence of the peculiar import of particular words, and difficulties arose out of the varied phraseology, until the adjudged cases settled a uniform rule of construction. In reference to this subject, Abbott, C. J., in the case of *Murray vs. East India Co.*, 5 Barn. & Ald. 204, after noticing the decisions which had settled the rule, remarked, that "the several statutes of limitation being all in pari materia, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same." I have already (he remarks,) quoted the words of the statute of fines. The words of the first section of the 21 Jac. 1, ch. 16, as it regards entry into lands are "that no person or persons shall make entry into any lands, &c., but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same;" other slight variations of expression may be found in other parts of this and the statute 32 Hen. 8 ch. 2; but it is not necessary to particularize them; the object manifestly being, to limit the time of entry or suit to a person in esse capable of entering and suing, and nothing more. With equal propriety may it be said, that the saving or proviso in our act of limitation, as well in the 6th as the 11th section, is to protect the rights of persons during disability, and three years after removal

thereof, and nothing more. Each section applying to the personal right of instituting legal proceedings by suit or action, notwithstanding in one the word action, and in the other person, is used, for the law of limitation affects nothing but the remedy.

In considering the proviso contained in the sixth section the question to be settled, renders it necessary to ascertain and determine, when the act of limitation attaches or commences running. For until the act attaches and begins to run, and the whole period allowed for bringing the action has elapsed, the action is not barred. Hence during the life of the feme covert, and also during infancy or incompetency of mind of the person entitled to the action, the existing personal disability, prevents so far as relates to the person under disability, the act attaching. But the death of the person during disability by transferring the remedy to a representative competent to sue, the administrator of the wife would only have three years in which to bring his action, from the time of death, and grant of administration: and the same would be the case as to the representative of a person dying in infancy. Admitting this to be so, it is insisted that during the life of the feme covert, as during the minority of the infant, the right of action continues, and their rights are exempted from the limitation act, and cannot be barred thereby, and as a consequence thereof, the husband suing in right of his wife, is entitled to bring an action for his wife's choses in action at any time during coverture, for it is conceded that the guardian is not barred but may sue in the name of his ward at any time during the continuance of the infancy. It may be proper here to remark, that the wife's right of action equally with all the rights of remedy belonging to her as a feme covert, were saved by our former acts of limitation. As entitled to the action or the person entitled, during the continuance of the disability, her rights being saved, it was never supposed the limitation act affected her right of action. Hence I consider it must be conceded that the words of the proviso in the 6th section which declare, "that act shall not be a bar to such action, &c.," have not varied the condition of the wife's right of action from what it was, under all former limitation acts. It must be so, unless it can be said of those acts, that they suspended or barred her right of action during coverture, and after having thus attached and run during coverture, on the termination thereof, ceased to operate and were suspended for three years, so as to cause her right of action to revive and exist after the disability of coverture was removed. Such a supposition would be contrary to all former experience; would neces-

sarily take away all right of action from the husband, and would be contrary to the well known and long established rule, that the statute when it has attached and commenced running never stops, and no subsequent disability can prevent its continuing to run. From what has been said it is evident, the wife's right continued during disability, confers upon the husband, when he by marriage becomes the person entitled to the action, a right of action which he in the prosecution of his own action may in her right enforce, and avail himself of the legal remedy belonging to him as a marital right; and for this purpose he has the time allowed after disability removed, as the period which the law determines as the legal time granted to the wife after coverture, and he enjoys it precisely as she would when *sui juris* upon *discoverture*. The husband under the saving clause acquires and enjoys the full benefit of the legal time intended to be secured to the feme covert after disability removed, although he may not be entitled to avail himself as to his right of action, of his wife's disability, so as to exclude his right of action from the operation of the act of limitation, or prevent it attaching.

Under the former acts of limitation in this State it was considered, and in the case of *Shankland's lessee* decided, that the husband could not take advantage of his wife's disability, because he was not within the saving of the act, and none others than those embraced within it could take the benefit thereof. If then under the former acts the husband was excluded, and against him the act commenced running from the time of marriage and cause of action accrued, and the attaching and running of the act was not prevented by the wife's disability, when as against the wife and her right of action, the act did neither attach nor run; how can the words in the 6th section of the present act sanction a construction that would give to him not only the three years within which to determine whether he will bring his suit, and during all which time he is under no disability or impediment, and may bring his action, but also the whole time of coverture, which in case of his surviving would be during the life of his wife. It seems to me such a construction once established, would be a virtual repeal of the act of limitation in favor of husbands, and they might be induced to delay suit, when in the full possession of all their rights; thereby taking advantage of their wife's disability, caused by their own ability, contrary to the manifest design and intent of the act, and contrary to the law of limitation, as operating upon them in all other actions instituted for the collection of their own debts. Then the law designed to protect the feme covert in

her rights, the proviso expressly founded on her personal disability, and intended to secure her rights against the effects of the husband's omission or negligence in enforcing or collecting them, would be diverted from its original purpose, and would be allowed an effect very different from the intention of those who made it. It may well be asked why should such favor be extended to husbands above all other citizens, or upon what principle can such a construction be sanctioned, especially when in conflict with the law of limitation as understood and established by adjudged cases as well in England as our own State? Can the adoption thereof be warranted upon the ground either of expediency or necessity, or is it rendered imperative as being the *lex scripta*, and therefore unavoidable? Surely it cannot be considered either expedient or necessary. For as there exists no personal disability on the part of the husband, if the policy of the law of limitations is regarded, it manifestly, contravenes the essential principles thereof, and must therefore be considered inexpedient. Nor can it be held necessary, since the rule as heretofore established does not deprive the husband, but leaves him in the full enjoyment of his marital right of action, in this case three years, and in all cases the same time, the law considers sufficient, as the legal right of the feme when discovered, and all that he as her administrator surviving could have; it would, therefore, seem unnecessary to confer upon him when *sui juris*, an indulgence as to time greater than the law grants the feme under similar circumstances. With respect to the other or remaining ground relied on, that the law is so written, if this be true, then there remains no room for construction. But I apprehend the whole difficulty results from the fact that the law is not so written; and, therefore, we are required to determine the question by the legal rule of construction.

Having thus adverted to the several and distinct grounds related in favor of the husband's right of action during the whole period of the wife's coverture, and noticed the objection to establishing the same by construction, I shall now proceed to consider the proviso as contained in the 6th section, and the legal effect thereof.

The 6th section provides, "that if the person entitled to any action, comprehended within either of the foregoing sections, shall have been at the time of the accruing of the cause of such action, under disability of infancy, coverture or incompetency of mind, this act shall not be a bar to such action during the continuance of such disability, nor until the expiration of three years from the removal thereof.

In attempting a literal construction of this section, we must allow to all the words their appropriate meaning and effect. Therefore before we consider the word action, it becomes necessary to determine who is the person contemplated as entitled to the action, for the condition of that person must conform to the situation described, and essential in order to have the benefit of the proviso, and must be a person under disability, for the act is declared not to bar such action, and is evidently restricted to a person entitled who is under a disability, and none other. Hence arises the difficulty when we attempt to embrace the husband within the proviso, as the *person entitled* to the action, for the disability must effect the person entitled to the action, and it is only such action which the act does not bar. But it has been supposed we may reject the person in the proviso and consider the action as independent of the person entitled, as not barred, and the husband becomes by marriage entitled to the action in her right, the action being saved he is not subject to the operation of the act. It has been supposed that the husband's right of action continues during coverture, like that of an infant suing by guardian* or a non compos by his trustee, which actions may be maintained at any time during the disability. It is true such actions are not barred, because they are always in the name of the minor or non compos, and therefore theirs exclusively, but the wife cannot maintain her action by her husband as the person entitled to the action, it would be an anomaly in legal practice. The right of action by marriage becomes a marital right, the husband capable, the wife incapable; being derived from her, the law requires that he should join her in the suit or action, for the purpose of showing that he is entitled to the chose in action in her right, and never has been considered as rendering the action hers. This could not be unless we reverse the effect of marriage, which in a legal sense merges the wife, and transfers all her personal rights to him, with full power by his action to recover possession, or by his own act to sell and assign the same. Their unity as making one person in law may be regarded as analogous to that of parceners who make but one heir; now it has been decided under the saving clause in the statute 21 Jac. 1, ch. 16, sec. 2, that if an estate descend to parceners, one of whom is under a disability which continues for more than twenty years, the disability of the one does not preserve the title of the other; and it is said by *Mansfield*, C. J., that no doubt so long as the disability of one parcener continued, the statuc would not run against her, but that after twenty years had elapsed from the death of the ancestor,

the parcerer who was free from disability could no longer have entered; and that it would be singular if she who had long lost her right of entry during the coverture of her sister, should have a right restored to her by the termination of the coverture. (2 *Taunt. R.* 441.) I have cited the preceding case as illustrating the effect of the statute of limitation upon joint rights involved in unity of title, and indicating how the right of the person under no disability may be barred, when that of the person under disability is saved from the operation of the act.

It may be said of the husband's right of action, in collecting the wife's choses in action, it involves that of the wife as her action enforces her right; still it must be conceded, that he is the person entitled to the action and under no disability, therefore his action cannot be saved.

Independent of the unity of right requiring joinder of husband and wife in bringing the action, if it be supposed they constitute in the legal technical sense two parties, the disability of the wife as one party cannot be of any avail to the husband, because it is now well settled that a replication to a plea of the statute of limitations must avoid the effects of the statute as to all the plaintiffs. The disability of one cannot be imparted to the others, and will not prevent the bar; all will be barred unless all be under the disability. (*Perry vs. Jackson*, 4 *T. R.* 516; *Marlettee vs. McClean*, 7 *Cranck. R.* 156.)

In the further consideration of the 6th section, it may be useful to inquire whether the peculiar phraseology thereof has not been occasioned by the declaration of the preceding sections, that "no action shall be brought unless within six years from the date of the bond, and in the other enumerated cases within the time prescribed from the accruing of the cause of action." The legislature having by the act expressly enacted in each of the five sections preceding the sixth, which contains the proviso we are considering, that no action shall be brought after the limitation prescribed, thereby negating and taking away all and every description of action, whether founded on contract or legislative acts authorizing suits on official bonds to the State; it certainly was right and proper, that the rights of persons under disability should be guarded by words sufficiently clear and explicit, leaving no doubt of their being amply and fully protected.

To accomplish this object they adopted the plain and unequivocal language in that part of the proviso which says, "this act shall not be a bar to such action during the continuance of such disability, nor

until the expiration of three years from the removal thereof," precisely the same as if they had declared the act should not run during the disability, nor until the expiration of three years from the removal thereof, because the act never bars the action until it has run and the time within which the right of action is allowed to be prosecuted has expired. In conformity with this intention, as I understand it, and for the purpose of effecting the same object, the 11th section after limiting the time of excepting within three years from the settlement of executor's, administrator's or guardian accounts, provides in respect to persons under disability at time of settlement, that the limitation shall begin to run from the ceasing of such disability, and not from the time of such settlement. Having thus arrived at the conclusion relative to the two sections, that they are the same in effect and equally provide for the exercise of, or save the right of the person under disability, and prevent the act barring their right until three years after the removal thereof, it may be proper to pursue still further the inquiry relative to the use of the words "this act shall not be a bar to such action during the continuance of such disability, &c." It has been already stated, that the limitation act applies to actions on official bonds and recognizances, on which the right of action was given by previous legislative acts; therefore, had these words been omitted when the act expressly declared, that "no action shall be brought after six years from date of bond," there would not have existed in such cases, after the expiration of six years, any right of action upon a cause of action accruing during disability, so long as the disability continued, for the party claiming it would only be entitled according to the act, and not as in other cases, by virtue of a contract; therefore, the right of action would accrue only on the removal thereof, and exist during the three years thereafter. It is evident the effect would be to deprive the husband upon all such causes of action, of the right to sue during the coverture. Hence appears the necessity for using the words in the 6th section: "that the act shall be no bar to such action during the continuance of the disability," for thereby the right of action as derived from former legislative acts is retained, and the repeal thereof by the last act prevented. The proviso does not like former acts, save the rights of persons under disability, but provides how and when they shall be enjoyed or exercised, and by excluding the operation of the act during disability, the effect is the same as a saving clause. The proviso may also have been adopted instead of the saving clause, to avoid the doubt which was once suggested upon that of the 21 Jac. 1, ch. 16,

which saved the rights of persons under disability, and allowed six years *after*, &c.; it was in the case of *Chandler vs. Hallet*, 2 *Saud. Rep.* 121, suggested that no right of action existed during the continuance of the disability, and the supposition was founded on the word "after," but this was not regarded by the court. The English statutes, therefore, did not bar the action during the continuance of the disability, and the words used in our act have introduced no new rule upon the subject, nor varied the rule in the law of limitation.

Having considered the peculiar phraseology of the 6th section, and ascertained the necessity and propriety of the words used to produce the same result that flows from the saving clause of former acts, and of all the English statutes, I shall now proceed to inquire which are the husband's rights, and how they are affected by the statute of limitations. I have already remarked, he is not personally embraced within the proviso of the act. The case there contemplated, so far as the person is concerned, is that of a *feme covert*, who being entitled to the action, becomes by marriage disabled, and by the law of coverture incapable of bringing the action; therefore, the proviso protects her right; and, as against her action, the act does not run during her disability, nor does the act operate as a bar until three years after the removal therefrom. But as the husband comes not within the reason of the proviso and is under no disability, if the action instituted by him to recover his wife's chose in action is his action, there being a complete cause of action, it follows as a necessary consequence of the established rule, that the act attaches. It is true he derives the right to the chose in action from and through his wife, but the remedy or action brought to reduce it to possession is his act or action and not hers. By the marriage he acquires and the law confers upon him the right of action; the necessity he is under of joining the wife does not impair his right of action; it is a marital right, perfect and exclusively under his control and direction, unaffected by her assent or dissent. Now, according to the long established and received opinion, all actions brought by the husband in right of his wife during coverture to reduce the wife's choses in action to possession are the actions of the husband, and although the disability of the wife will not avail him so as to prevent the act attaching and running against his right of action, yet until the cause of action accrues, the act of limitation cannot attach or commence running.

Such is the rule in all causes of action founded on contract; and

in the present case, the proviso in the 6th section excludes the operation of the act when the cause of action accrues during disability. Hence I consider the husband's right of action is founded on the accruing of the cause of action, and his exemption from the limitation in the 1st section arises from the fact, that the cause of action accrued during the disability of the feme, and therefore entitles him to the extended time, or three years before the act bars his right. The limitation never acts so long as the person entitled to the remedy either by infancy, coverture, or incompetency of mind is disabled; it is a personal privilege granted on account of the personal disability, but is incapable of transfer either to the personal representative on death, or a husband by marriage. Upon the marriage or death, there being a person on whom the law confers the right of action, and who is under no disability the act attaches, and has always been held as then commencing to run, provided the cause of action has accrued.

If then in the present suit the record avers the fact that the cause of action accrued during coverture, the suit instituted within three years thereafter was not barred. This I consider the result of the legal and correct construction of the 6th section of our act of limitation, and it is in accordance with the adjudged cases, as well in England as our own State.

The first case I shall advert to is the decision made by the High Court of Errors and Appeals of this State, in the case of *Shankland's lessee*, in which the husband being barred as to his right, brought the action in right of his wife joining her name in the suit; and as the wife's right was within the act of limitation, or the saving clause thereof, it was contended that he was protected because she was under the disability of coverture, and the point decided by the court was, that the saving clause of the act could not be extended to the husband, because he was under no disability.

The same principle we find adopted in the case of *Hulm vs. Heylock*, Cro. Car. 200, under the statute 4 Hen. 7, chap. 24, J. M. being seized of land devised it in fee to J. G. an infant of the age of three years. The son and heir of J. M. entered and levied a fine with proclamations in the life of J. G. being within age, who afterwards died being within age, the wife of Heylock being his sister and his heir. It was decided that the fine and non claim barred the husband, who had suffered the five years to pass.

In *Doe on the demise of Wright vs. Plumptree*, 3 Barn. & Ald. 474, the husband who was the lessor of the plaintiff, and claimed in right of his wife, the defendant having levied a fine with pro-

clamations was thereby barred, he not having entered within five years after his title accrued. In this case *Best*, J., remarked, that although the wife, if she survived her husband, would be entitled to enter within five years after his death, yet that her husband not having made an entry or brought his action within the time prescribed, was barred by the fine. It was contended on a motion for a new trial, that the husband who claimed in right of his wife might enter at any time during the coverture. That it is clear an infant by his guardian might avoid a fine by an entry at any time during his infancy; and that by parity of reason a husband claiming in right of his wife might avoid the fine during coverture, for the wife's interest, it was said, is kept alive during the whole period of coverture. But the court were clearly of opinion, that the husband not having entered within the five years after his right accrued was barred by the fine; and the case of *Hulm vs. Heylock* was referred to as deciding the point.

It has been suggested that the construction I have given to the 6th section, will not effect the object of the act of limitation. For it is said, the right of action of the wife continuing until three years after her discoverture, the husband as her administrator, if he survives, will then be enabled to bring an action, or the wife surviving may bring her action. This would be the case should the husband neglect his right of action. But the objection is not well founded, for it is to be presumed that in all cases, the husband will take care of his own right of action, while he may and has the power to do it, and not abandon the exercise thereof because he may possibly survive his wife and gain a new right of action as her administrator. If he does assert his marital right, then the object of the act is accomplished, and the litigation settled within three years from the accruing of the cause of action, while the parties interested are presumed to be cognizant of their rights, and the vouchers and evidence can be available. The husband's action being prosecuted extinguishes the wife's right of action, for the chose in action being thereby reduced by the husband into possession, the property therein becomes his absolutely, and nothing remains to her surviving, nor can any right be transmitted on her death to her administrator. Hence it appears, that the construction which limits the husband's right of action to three years from the accruing of the cause of action does sustain the policy of the act of limitation, and therefore must necessarily conduce to the peace of society; for it is the interest of the public that there should be an end of controversy.

Having considered the case with respect to the construction of the 6th section of the limitation act and arrived at the conclusion, that it is not the disability of the wife, bpt the accruing of the cause of action during disability which determines the time when the act begins to run as against the husband's right of action, I shall now proceed to the other matters relied on as distinct grounds of error.

The first I shall advert to is the insufficiency of the replication, and whether the objection taken can avail the plaintiff upon the general demurrer. It has been insisted that the omission to allege and aver the full age or maturity of all the children on whose arrival to the age of maturity the estate was to be divided, is fatal, for without it no cause of action appears.

This matter has been relied on as well against the replication to the plea of the statute of limitations, as in the assignment of the breaches. In reference to the omission in the assignment of the breaches, it has been said the verdict cures the defect and that in the replication to the plea of the statute of limitations it was not necessary, as the plea to which the replication applies admits the cause of action. If the omission be a mere defect in the form of stating the right or title, then the verdict and judgment would preclude the party from taking advantage thereof as error. The distinction is clearly recognised by lord Mansfield in the case of *Rushton vs. Aspinall, Doug.* 658. He says, on looking into the cases we find the rule to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately, because to entitle him to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated, must be proved at the trial, it is a fair presumption after verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore, there is no room for presumption. The case cited from *Shower*, comes within the distinction; for the grant of the reversion was stated, which could not have taken effect without attornment, and therefore, that being a necessary ceremony, it was presumed to have been proved. But in the present case it was not requisite for the plaintiff to prove either the demand on the acceptors or the notice to the defendant, because they are neither laid in the declaration, nor are the circumstances necessary to any of the facts. If they were presumed to have been proved, no proof at the trial can make good a declaration which contains no ground of action on the face of it. The promise alledged to have been made by the defendant is an inference of law, and the

declaration does not contain premises from which such an inference can be drawn. In the case of *Avery vs. Hoole*, Easter Term, 18 Geo. 3, it is remarked, a verdict will not mend the matter where the *gist* of the case is not laid in the declaration, but it will cure ambiguity; and there is a strong case in print of an action for keeping a malicious bull, where the scienter having been omitted in the declaration it was held bad after verdict. (*Buxendin vs. Sharp*, 2 *Salk.* 662; 3 *Salk.* 12.) In *Chitt. on Pl.* p. 319, it is said the omission of the averment of the performance of a condition precedent, or of the excuse for non performance, is fatal on demurrer, or in case of judgment by default; but after verdict the omission in some cases may be aided by the common law intendment, that every thing may be presumed to have been proved which was necessary to sustain the action; for a verdict will cure a case defectively stated, (1 *Saund. Rep.* 228, n. 1, *sed vide Doug.* 679; *Cro. Car.* 503; 6 *T. R.* 710.) In the last case the procuring a certificate from the minister as to loss by assured, held necessary before payment could legally be demanded or any right of action accrue. On error the judgment rendered on verdict, for the omission of the certificate, reversed. In this case the pleadings admitted that the certificate had not been procured, and alledged as a reason for the omission, the refusal of the minister. In all the cases, after verdict and judgment, it has been the effort of judges to avoid a reversal, when by any legitimate method they have been able to allow the common law intendment to prevail.

If, therefore, it be possible to apply the rule, in the case now before us, it would be proper to do so, if it could be done consistently with the decided cases and without violating the established rules of pleading. But we are not left to dispose of the case exclusively under the operation of the common law intendment; for supposing it might be thereby concluded, of which there seems to be much doubt, we would be compelled to consider the objection as it meets us under the demurrer to the replication. For if the facts omitted be essential to the right of action, the want of the allegation and averment thereof must be fatal.

In this case, tracing the line of pleading from the declaration, through the plea of the statute of limitations, the replication and demurrer, we find the narr. founded upon the administration bond, upon which alone, and exclusive of collateral matter, the right of action is restricted or limited to six years from the date thereof. The plea of the statute of limitations relies upon the expiration of the time, or

sets up the defence that the six years have elapsed since the date of the bond, before action brought. It admits the execution of the bond and the condition thereof, but denies the right of action or remedy because the six years from date have expired before suit brought. If then the party cannot avail himself of a cause of action which has accrued within the saving of the act or the proviso of the 6th section, the right of action is barred. But if the cause of action has accrued during disability, by the proviso in the 6th section the right of action is continued, and the plaintiff in his replication, by alledging the fact, relies upon it as preventing the bar of his right of action. The proviso contemplated the concurrence of two facts as essential to save the right of action; first disability, and second the accruing of the cause of action during the existence of the disability, without which the right of action is not complete or perfect. Thus it will be perceived that the accruing of the cause of action when relied on to exclude the bar of the act, must be alledged in the replication, so as to present an issue of fact, which may be either by the usual mode, or if the plaintiff replies, stating the facts specially, he must not omit any fact that is essential, as being by its existence or occurrence the foundation of his right of action. The reason why he is required when he undertakes to state the facts specially, to state them all, will be obvious, when we reflect that the omission of any one renders it impossible for the defendant to traverse or deny what is not alledged; and by joining issue on the matter stated, although it might be insufficient yet if true it would be found against him. Therefore to an insufficient replication the defendant is compelled to demur; thereby the facts stated are admitted to be true, but are denied to be sufficient in law. The replication in this case having been demurred to, we are to consider the facts therein stated or alledged to be true, and so considering them, our duty is to determine whether thereby the fact that the right of action accrued during disability is established; for the legal maxim, non apparente et non existente must apply. In this case, from what has been heretofore said, I consider the husband's right of action upon the administration bond, to depend on the accruing of the cause of action during the wife's disability. Hence it will be manifest that the accruing of the cause of action, is the fact essential to be established, and therefore the replication should either alledge that the cause of action accrued during the disability of the wife, and that the action was brought within three years thereafter, or if that is not alledged but the facts stated specially, they must be such as by their existence or

occurrence are averred as equivalent and sufficient to constitute the cause of action." It being a cause of action out of the bond although secured by it, the fact of its being due and payable must be alledged, and if dependent on any event, as the arriving at the age of maturity of A. B. and C., it must be stated and averred that A. B. and C. have arrived at the age of maturity. For if it be only averred that C. has arrived at full age, it does not allege all that is required to establish the event necessary to confer the right of action; and certainly no right of action can accrue until all have arrived at full age. We have only to take the common case of a bond conditioned to divide a sum of money between A. B. and C., when they arrive at full age, there could be no breach until all had arrived at full age; nor could a cause of action accrue prior thereto, and being an event that must happen before any division could be made, it would constitute a condition precedent to the accruing of the right, and no right could accrue until all arrived at full age, and therefore, no cause of action could possibly accrue until then.

We will now take up the replication which the plaintiff below relied on as bringing the case within the proviso of the 6th section, and which has been demurred to by the defendant below. It is in the words following : " precludi non," &c. because he saith that the said John Wilson, carpt. deceased by his said last will and testament, in writing bearing date the 29th day of November in the year last aforesaid, did among other things devise as follows, that is to say : " Item, It's my wish and desire that my estate shall, after taking out the legacies that I have given my daughter, be equally divided between my sons, David, James and daughter Elexine Wilson, when they arrive to the age of maturity ;" and that the said Elexine Wilson afterwards intermarried with and became the wife of the said William Hazzard, on the 9th day of January, A. D. 1884; and that the said Elexine arrived to the age of twenty-one years on the 22d day of June, A. D. 1840, and this suit was brought and instituted within three years after the said Elexine had arrived to the age of twenty-one years or maturity as aforesaid, and this, the said, J. W. H., who sues in this behalf as aforesaid is ready to verify, wherefore he prays judgment, &c.

The facts alleged in this replication are, 1st. that John Wilson deceased, made his will devising his estate to be equally divided between his three children when they arrived to the age of maturity. 2d. The marriage of Elexine with Wm. Hazzard, January 9th, 1884. 3d. The time when Elexine arrived to the age of twenty-one years,

June 22d, A. D. 1840. 4th. That this suit was brought within three years after Elexine arrived to the age of twenty-one years. The demurrer admits the facts as true, and being so do they establish according to what is shown on the face of the replication itself, a right of action? Does not the statement of the testamentary clause disclose the fact, that no division of the estate could be made between his children until they arrived (or when they arrived) to the age of maturity; now after thus disclosing the event on the concurrence of which the right to a division by the testator was made to depend, and consequently, the right of action postponed until the period arrived when they became of full age, upon what ground can it be pretended that one having arrived to full age, by reason thereof is intitled to a division, or can have a right of action. Having shown the right to depend on their all attaining their age of maturity, it would appear right and proper, that the fact should be alleged and averred, that they all had attained the age of twenty-one years or arrived at the age of maturity. For as remarked by Lord Mansfield in the case of *Rushton vs. Aspinal*, not being stated and not being a fact necessary to any of the facts charged, the replication does not contain premises from which we are authorized to make the inference that all the children have arrived at full age. Had it been set forth in the replication that Elexine was the youngest of the children, or had the clause of the will so described her, there might then have been some ground from which we could have drawn the inference, but as the matter is now before us on the replication, non constat, that because Elexine has arrived at the age of maturity, or twenty-one years, that the other two children have. Then how can we, until that fact does appear, decide that the cause of action has accrued, or that the right of action under the saving clause of the act or the proviso in the 6th section thereof, has accrued to the wife during disability.

The plaintiff below having omitted to aver the fact that all the children had arrived at the age of maturity, has failed to state the fact essential to his right of action, and therefore, upon the demurrer, the defendant below was entitled to the judgment of the court sustaining his demurrer. This omission the Court of Errors and Appeals consider a fatal defect in the replication, and are unanimous in the opinion that, therefore, the judgment of the Supreme Court should be, and the same is hereby reversed. The defendant in error is ordered to pay the costs of the writs of error and proceedings thereon, and the record is remanded to the court below.

MILLIGAN, Justice:—On the 29th of Nov. 1825, John Wilson made his last will and testament, and died on the 20th of Dec., following. The will was proved on the 29th of Dec. 1825, and the executor named in the will having renounced, the defendant, Caleb S. Layton, was appointed by the register, administrator with the will annexed, on the 11th of January, 1826, and thereupon gave the bond upon which the suit below was instituted. The testator, John Wilson, who left to survive him two sons, David and James, and one daughter, Elexine, directed by his will, that his estate after the payment of certain legacies, should be equally divided between his two sons and his daughter, upon their attaining “their age of maturity;” in other words, upon their attaining the age of twenty-one years. Elexine was married to William Hazzard, on the 9th of Jan. 1834, and attained the age of twenty-one years on the 22d of June, 1840. William Hazzard and Elexine, his wife, claiming a balance as due to her from the defendant Layton, the administrator, on account of her third part of the estate of her father, John Wilson, bequeathed to her as above stated, brought the action of debt in the Superior Court, which is the subject of the writ of error now depending in this court. The record, which is now before the court, exhibits the following pleadings. The declaration counts upon the administration bond of the defendant Layton, who craves oyer of the bond and of the condition, and having set forth the condition on the record, pleads *first*, non est factum; *secondly*, performance, and *thirdly*, the statute of limitations. To the first plea there is a replication and issue. To the second plea there is an assignment of breaches, rejoinders, surrejoinders and issues; and to the third plea there is a replication stating the terms of John Wilson’s will, that the estate was to be equally divided between the sons, David and James, and the daughter Elexine, when they arrived at their age of maturity, and that Elexine was married to William Hazzard on the 9th of Jan. 1834, and arrived at her age of twenty-one years, on the 22d of June, 1840. To this replication there is a demurrer and joinder in demurrer. In the court below the demurrer was overruled, and judgment rendered against the defendant Layton. The issues joined in the other pleadings were afterwards tried, and a verdict given in favor of Hazzard and wife for the sum of \$3,109 84, upon which judgment was rendered in their favor. Several errors have been assigned, but the one mainly relied on in the argument of this cause is the rendition of judgment in favor of the plaintiffs on the demurrer. In relation to which branch of the case, it is contended that

the replication was not a sufficient answer to the plea of the statute of limitations, inasmuch as it neglected to state that David and James, the two sons, had attained their age of twenty-one years as well as Elexine.

In order to understand the objection, it is necessary to consider the terms of the statute itself. The first section of the act declares, that no action shall be brought upon any administration bond after the expiration of six years from its date. In this respect, it differs from all the other sections of the act, in making the time of the limitation run from the date of the bond, instead of the accruing of the cause of action. This section embraces the official recognition of the sheriff, and administration and testamentary bonds. In the case of all other official bonds, and of all personal actions, the statute does not begin to run but from the accruing of the cause of action, and no reason can be perceived why a different rule should have been established in relation to sheriff's recognizances, and administration and testamentary bonds. The absurdity may follow, that a person may be barred before his cause of action arises. The 6th section provides, "that if the person entitled to any action comprehended within either of the foregoing sections, shall have been at the time of the accruing of the cause of such action under disability of infancy, coverture, or incompetency of mind, this act shall not be a bar to such action during the continuance of such disability, nor until the expiration of three years from the removal thereof."

The result would be, that the common case of a legacy to be paid to a child on his attaining his age of twenty-one years, if he were under fifteen years of age when the will was proved, and the administration or testamentary bond given, would not come within the terms of the proviso. And thus the very bond which was given to secure its payment, among the other duties of the administrator, would be barred by the statute, since supposing the legatee to be a boy, and to be *compos mentis*, he would be under no disability *when the cause of action arose*. For as the legacy would be payable only, when the individual had attained his majority, at which time alone the cause of action would arise, it results as a necessary consequence that the legatee not being under any disability when the cause of action arose, he would not come within the terms of the proviso, and therefore, would be barred by the first section, which requires that the action should be brought within six years from the date of the bond. It would seem that there must have been some inadvertency in framing the 1st section of this act, which however, the legislature alone is

competent to correct, since the words are positive and explicit. As to the provision of the 6th section, I have no doubt that the words "person entitled to the action," referring as they do to the different disabilities of infancy, coverture and incompetency of mind, refer in the case of coverture to the wife, since the husband cannot be under any disability from that cause, and although it is technically true that the wife's existence is merged in that of the husband, and that she cannot, strictly speaking, be said to be entitled to the action, yet it is apparent that they are meant to be used in reference to her rights, from the provision that the act shall be no bar, during the continuance of the disability, which as has been said, cannot possibly apply to the husband. And although the husband, if he could bring the action in his own name would be barred by the 1st section of the statute, yet as the right of the wife to sue during the continuance of the coverture is expressly preserved, it follows that as she cannot sue in her own name, the effect of the proviso is to preserve the action to the husband and wife during the coverture, and to the wife after the death of the husband, if she survive him.

I am therefore, of the opinion, that an action by husband and wife, comes within the terms of the proviso, if the cause of action accrue during the coverture. But in this case, it is not shown by the replication, that the cause of action has yet arisen, and non constat, that it will arise during coverture. The bond was given on the 11th of January, 1826,⁶ and the action was instituted in March 1841. But the proviso of the sixth section declares, that "if the person entitled to the action shall have been *at the time of the accruing of the cause of action*, under disability of infancy, coverture, or incompetency of mind, the act shall not be a bar during the continuance of such disability, nor until three years from the removal thereof." In order to avoid the bar of the statute, it was necessary for the plaintiffs to show in their replication that their cause came strictly within the terms of the proviso. In other words, it was necessary to show that the person entitled to the action was under some one of the disabilities of infancy, coverture, or incompetency of mind, *when the cause of action arose*.

Admitting then that wife is the person entitled to the action and is under coverture, and has been so since the year 1834, yet as the cause of action could only arise upon all three, David, James and Elexine, attaining their age of twenty-one years, it was indispensable to show that fact. The replication only stated the fact that Elexine attained her age of twenty-one years, on the 22d of June, 1840; but

does not state that she was the youngest of the three, or that the others are dead, or have attained their age of twenty-one years. It might then be true, that the others, David and James, were minors, or that one of them was so, in which case, the cause of action would not yet have arisen, and might not arise until after the death of William Hazzard; when, if Elexine were living, not having married again, and being discovered when the cause of action arose, she would be barred by the terms of the 1st section. It is an invariable rule, that the replication must be a complete answer to the plea; in this case it clearly is not so, and judgment must therefore be given for the defendant.

As a member of the court below, before whom this case was heard, I think it due to myself as well as to my associates to state, that this objection to the pleadings was not noticed in the argument of the demurrer.

ROGERS, Judge ad litem.—The record in this case exhibits a suit brought under the provisions of the act relating to bonds and penal sums in the name of the State, for the use of William Hazzard and Elexine, his wife, against Caleb S. Layton. The action is founded upon the bond given by the defendant as administrator, with the will annexed, of John Wilson, deceased.

The questions necessary to be decided, arise under the demurrer to the plaintiff's special replication to the plea of the act of limitations. That portion of the pleadings opened by the demurrer, consists of the declaration upon the bond, which contains no assignment of breaches; the oyer of the condition and the plea of the act of limitations, and the special replication. This replication states the testator's bequest of the residue of his estate: that the said Elexine intermarried with William Hazzard on the 9th day of January, 1834; that she arrived at the age of twenty-one years, on the 22d day of June, 1840, and that the suit was brought within three years after her arrival at the age of twenty-one, or maturity.

The administration bond is dated the 11th day of January, 1826. The 1st section of the act of limitations declares, that no suit shall be brought upon any administration bond after the expiration of six years from its date. By the 6th section it is provided, that if the person entitled to the action shall have been at the time of the accruing of the cause of action, under either of the disabilities mentioned, the act "shall not be a bar to such action during the continuance of such disability, nor until the expiration of three years from

the removal thereof." The great object of all statutes of limitation is to prevent the litigation of stale demands. Their provisions are founded in public policy, and their operation is upon the *laches* of the party entitled. They are upon the remedy alone. Such being their aim and scope it is indispensable, under the great principles of common right, that a perfect right of action should exist before a forfeiture arising from default can begin to attach.

A remedy for legal injury must be provided for by fundamental law. It is one of the first principles of every social compact, and is expressly secured by the constitution. Legislative power may limit and restrain, but cannot *take it away* without infringing upon those essential and inalienable rights, which are placed beyond its control. In accordance with these principles, it has been uniformly decided, that acts of limitation do not begin to act upon the remedy until the *right*, under the general rules of law, has been fully consummated. This can occur only where there is a competent jurisdiction, a person to sue and to be sued, and a complete cause of action.

In this case it is contended, that the plea of the act presents an absolute bar to the remedy of the husband, and that the action is exclusively his. It is admitted that had Elexine Hazzard remained sole, she would have had a subsisting right of action at and after the period when the present suit was instituted. The assumption that the title of the husband is affected is founded on the fact, that at the moment of the marriage there was a person competent to sue, although the wife was still an infant. By the marriage the husband acquired a conditional right to the choses in action of the wife, but still subject to all their original contingencies. Here the replication alleges, that by the will the wife's proportion of the residue was not payable until she arrived at maturity, or the age of twenty-one years. The husband then could not reduce this chose in action into possession until the happening of the event upon which it was made payable. Had he sued previous to the wife's arrival at maturity, the action would have been prematurely brought. A complete cause of action did not exist until the time of payment had elapsed. The replication, therefore, substantially alleges, that the cause of action did not accrue until the 22d day of June, 1840. The writ was issued on the 19th of March, 1841.

Marriage operates as a conditional gift to the husband of *all* the wife's choses in action. The cause of action here is the breach of the condition of the bond, which could not occur until the failure to pay over at the time appointed by the testator. The husband at

some period acquired a right to sue for this default. His remedy upon *this cause of action* cannot be abrogated. If then the act of limitations applies, the remedy is barred prospectively, before the cause of action is complete, and the husband has lost by *necessity and without laches*, a right secured to him by the general rules of law, and the provisions of the act under which this suit is instituted.

At the time of the intermarriage in 1834, the wife being an infant, the obligation of the administrator was still subsisting, and unaffected by the statute. The husband then acquired his marital rights, and became entitled to avail himself of the provisions of the act relating to bonds and penal sums, as soon as his right of action should be perfected. Had the legislature subsequently repealed that law, without substitution, and thus deprived him of redress, it could not have affected his rights, because as to him their action would have been void. But the positions assumed on behalf of the defendant, if sustained, do in effect operate as a repeal of the remedy existing at the time when the marital rights were acquired, and show that the husband never could have sued on this particular cause of action. Such a construction would lead inevitably to the conclusion, that the statute is unconstitutional in its application to the circumstances of the present case. But this difficulty is avoided by referring to the general rule, that the statute does not begin to run until there is a complete cause of action, as well as competent parties and jurisdiction.

Verbal or literal construction has very seldom prevailed in the interpretation of the acts of limitation. The courts almost invariably look only to their spirit and policy. The first section of our statute contemplates a limitation commencing with the *date of the bond*. The proviso regards only the *accruing* of the *cause of action*, and saves the right to sue in all cases where the specified disabilities exist at *that time*.

If, where no disability exists, the act is to be held a bar in cases where the cause of action does not accrue until after the period of limitation has elapsed, then it forestalls the remedy, and impairs the very obligation of the contract. Besides this, such a construction would be directly adverse to the acknowledged policy of preventing delay in the prosecution of suits, and would not only impose the penalty of default upon an innocent party, but also introduce a most absurd conflict of principles. From these considerations I draw the conclusion, that notwithstanding the words of the 1st section, the act is not a bar to the present suit. This view of the case is entirely

independent of the fact of disability, and the several questions of construction arising under the proviso.

The writ was issued within a few months after the cause of action was complete, and the replication specially alleges that the suit was brought within three years. The several questions of the right of the husband to avail himself of the wife's disability, and whether such right continues during the whole period of coverture do not inevitably arise. I sit as a judge in and for the present controversy alone. The tenor of my commission is to try and decide this particular case. I am unwilling, therefore, to express my views upon any questions beyond those which *must* be decided. Such opinions would be particularly extra-judicial and without authority.

There remains, however, another point to be disposed of. It is contended, that the plaintiffs have shown no right to sue, inasmuch as they have stated in their replication, that the residue of the estate was to be equally divided between the testator's three children, when they arrived at maturity; and there is no allegation that they had all arrived at such age at the time of bringing the action. Were this a question of construction arising upon the will of John Wilson, with that will before the court, it is very probable that there would be little difficulty in its settlement. But it is insisted upon as a defect in pleading, and the omission of a most material allegation.

The replication is unquestionably argumentative, and the right of the children of the testator to sue as they *severally* arrived at maturity, must be a mere matter of *inference* from the words of the will as stated. Considering it as a question of construction, we would be at liberty to look through the record to ascertain in what aspect the pleader has elsewhere placed it. The rule which forbids resort to other branches of the pleadings to help out the allegations, where there are no words of reference or connexion, does not apply to the question of construction. If the matter stated be capable of different meanings, it certainly does not clash with any principle to interpret it in that sense in which the party framing the allegation must be understood to have used it, if he intended that his statement should be consistent. This is the established rule even in criminal proceedings. By reference, then, to the other replications it will be found that in the 1st, 2d, and 3d breaches, the mode of statement is such as to render the inference no longer doubtful. It is expressly alleged, that the division was to be made when *all* the children had arrived at maturity; and that fact is nowhere stated, nor is it in any

portion of the pleadings set forth that the money was payable as they severally arrived at age.

But this matter cannot properly be considered as a thing of inference, or a question of construction. It is an allegation of a *fact* material to the present right of action. The pleader could not, except in violation of well known principles, set it forth by way of argument or inference. As an allegation of fact, if the meaning of the words be equivocal, the rule requires that they be construed most strongly against the party pleading.

But is the statement *equivocal*? What is the *fact* alleged? That the residue of the testator's property was to be "equally divided between his sons David, James, and daughter, Elexine Wilson, when they arrive to the age of maturity." Were this a question of inference, from these words alone it would be difficult to construe the meaning of the testator to be payment to the children as they respectively arrived at age. To *divide* is to *separate and bestow in shares*, *to part an entire thing, to make partition of among a number*. It contemplates a *single act*; a disunion of the several parts at the same moment; and that moment is here alleged to be when the parties arrived at maturity. But as an allegation of fact is the statement equivocal, or capable of different meanings? It sets forth the *time* of payment, the period when the cause of action is complete. It is not intended to show the *mode of distribution*, but as an answer to the plea, indicates that the money was not payable until a particular event; and that therefore, inasmuch as there was not a complete cause of action until that period or event, that the statute is not a bar, although I have considered the replication, notwithstanding its defects of form, as sufficient for that purpose; yet in its present aspect I am reluctantly brought to the conclusion, that in the absence of the allegation that all the children had arrived at maturity, the plaintiffs' have not exhibited a sufficient title to sue at the time the action was instituted. (a) Had it been alleged that the money was payable to them as they *severally* arrived at maturity, or that *all had* arrived at that age, or that the daughter was the *youngest child*, it might have been held sufficient. As the matter stands, however, I have no doubt that it is a fatal defect under the demurrer, as it would

(a) The plea of the act of limitations admits the cause or consideration of the action still existing, but it cannot cure the omission of matter necessary to exhibit a perfect title to sue.

have been on a motion for a nonsuit had such question been presented to the court below.

Judgment reversed.

Ridgely and Frame, for plaintiff in error.

Houston and Woollen, for defendants in error.



JOHN R. BURTON and wife, appellants *vs.* JOSHUA S. BURTON and wife and MARY SHORT, appellees.

JOSHUA S. BURTON and wife and MARY SHORT, appellants *vs.* JOHN R. BURTON and wife, appellees.

A testator devised that the residue of his *estate*, both real and personal should be divided between his wife and two half sisters, "as the law directs;" *held*, that the wife took but a *life estate* in one half the realty; (the testator having died without children.)

APPEAL from chancery. Before all the law judges.

This was an appeal from the decree of the chancellor in Sussex, in a case of partition under the will of John C. Burton, which after several bequests of personal property to his wife, Elizabeth Burton, devised as follows:—"Item, my will and desire is, that the residue of my estate both real and personal, shall be divided between my said wife Elizabeth, and my two half sisters, viz: Ruth Burton and Mary Short, as the law directs; giving my said wife her lawful part of the said residue." And he made his wife sole executrix.

The testator died seized in *fee* of several tracts of land in Sussex county. John R. Burton and wife, who was the widow of John C. Burton, filed their petition in chancery for partition of the lands, &c. of which John C. Burton died seized, claiming *one half in fee simple* for the widow.

The chancellor decreed partition and assignment *in three equal parts*, and that one part should be assigned in severalty and *in fee* to the petitioners in right of the widow; and one third to each of the half sisters *in fee*. From this decree both parties appealed. The appeal of the respondents came up first for hearing. The error assigned was, that the chancellor decreed a partition of the lands in thirds and *in fee*; whereas he should have decreed to the petitioners

only an estate *for life*, in right of the wife, in one third of the real estate.

Houston, for J. S. Burton and wife and Mary Short, contended, that the widow was entitled to only one third of the land for life, as she would have been entitled to the same as dower; with remainder to the heirs at law. She could not be entitled to a half, for this is not a case of intestacy, and the act of assembly gives the widow (without children) one half only in case of an intestacy. The testator could not then have referred to the intestate law when he devised to his widow her *lawful* part, but must have referred to the dower law, the act of 1816, which gives the widow only a third.

If this be not clear, the devise is void for uncertainty. What is the lawful part? What law is referred to; the common law, the act of 1816, or the intestate law? By the common law the land would descend to the half sisters in severalty, in fee and in equal shares, per capita, and not per stirpes; the devisees being named, with a direction to divide equally. (2 *Harr. Rep.* 103; *Doe ex dem. Kean vs. Hoffecker*.) Under the intestate law, the wife would take one half; and under the act of 1816 one third, for her life. Now, if it be not clear which of these rules the testator referred to, as that which the law would apply to the subject of his devise, the devise is void. (21 *Law Lib.* 206, 351; 8 *Ibid.* 142, 262; *Bac. Ab. tit. devise*; 3 *Barn. & Cress.* 825, *Thomas vs. Thomas*.)

Ridgely, for John R. Burton and wife, thought that the devise had a clear reference to the act of 1827, the intestate law. The testator had no children; and, had he died intestate, his wife would have been entitled to one half of the land for life. With this view of the law, he divided his land into two parts; to his wife one part, and his two half sisters the other part, and refers to the law to show that these parts should be *equal*. Then as to the interest which his widow was to take in this share he used words which carry not merely a life estate but the fee. The word "estate" passes not merely the land, but all the interest of the testator in the land. (22 *Law Lib.* 220, 412.)

If this be not the construction as to the widow, the half sisters take but a life estate, for the words are the same. Yet this cannot be, for the testator evidently intended to dispose of all his estate real and personal.

Houston, in reply:—Had the petitioners claimed under the act of

1827, the intestate law, and asked for a half of the land for life, it would not have been resisted; but when they claim under that act in reference to the share, and abandon it, claiming under the common law, as to the interest in that share, thus claiming a half in fee simple, we were compelled to resist this claim. And now we come to ask what is the true effect and operation of this devise.

The argument on the other side proceeds on the technical meaning of the word "estate," as if that could not be controlled by the intention of the testator. Whenever it appears that the testator uses the word estate as referring to the corpus of the land and not to the title or interest therein, it has no effect to enlarge the devise. (22 *Law Lib.* 221, 223.)

The fact that the testator had no children at his death, cannot be considered by the court in the construction of his will.

And if the court can resort to inferences, they will presume that the testator referred to the act of 1816, which is the general law of dower, rather than to the intestate law of 1827; when the fact was that he was not about to die intestate as to any of his property.

The chancellor stated the grounds of his decree.

He regarded 1st, the general intention of the testator to dispose of all his estate. 2d. That in the distribution it was to be equal; and 3d. That as he named the parties who were to take, they took per capita, and not per stirpes. He thought the word "estate" as used by the testator, was to be taken in its proper sense, and carried the fee simple in the land, and that there was nothing to show a contrary intention; and that the will had reference to cases of testacy, and not of intestacy, for the law of distribution. The testator could not be considered as having reference to the intestate law as applicable to the land which he was by the act of making a will, taking out of the operation of that law.

By the Court:

Booth, Chief Justice.—By the record in this case, it appears that John C. Burton, the testator, being seized in fee and possessed of certain real and personal estate, and having a wife named Elizabeth, now the wife of John R. Burton, and two half sisters, Ruth Burton and Mary Short, but no child, children or issue, made his last will and testament, bearing date the 9th of January, A. D. 1840. The testator soon afterwards died without issue, leaving to survive him the said Elizabeth, his wife, and his two half sisters before named, who are his heirs at law. His will was proved in due form. His wife, Elizabeth, seems to have been the peculiar object of his bounty

in the disposition of his personal estate; for he gives to her the greater part of it absolutely and forever, to wit:—all his household and kitchen furniture, his slaves, his two best horses, his gig and harness, all his stock of cattle, ten head of hogs and twenty head of sheep of the first choice, his cart, ox-wagons, all his farming utensils and five hundred dollars in cash. But in the disposition of his real estate, his two half sisters are objects of his benevolence, as well as his wife; and therefore he devises it, and the residue of his personal estate to all three of them, in the next item of his will, in these words: “my will and desire is, that the residue of my estate, both real and personal, shall be divided between my said wife Elizabeth, and my two half sisters, viz:—Ruth Burton and Mary Short, as the law directs, giving my said wife her lawful part of the said residue.” The question raised in the argument is this: what are the respective shares of the wife, and of the two half-sisters in the real property devised to them; and what quantity of estate or interest does each take in her share?

The doubt or difficulty, if there be any, arises from the misapplication of principles of law brought into the case, which have no bearing on the question; and from abandoning the obvious and common sense view of the devise, which the very words of it present. The testator says, that the residue of his estate, both real and personal, shall be divided between his wife and his two half sisters,—not equally, or he would have said so,—but *as the law directs*; that is, into such parts or shares as are prescribed in such case, by some law of the state. It is his will, that the residue of his real and personal estate shall be so divided. To what law can it be rationally supposed he referred, for the purpose of designating a division? Surely to no other law than such as directs the distribution of personal, and the division of real estate, in a case where the owner dies without issue, leaving a widow and two half-sisters to take his property. No other law could possibly effectuate his intention; and therefore to suppose that he referred to any other, is contrary to reason. What law then of the State of Delaware directs the division of a man’s real and personal estate in the condition in which this testator was placed, without child, children or issue, and leaving a wife, and two half-sisters, the latter being his heirs at law? None other than the law relating to the estates of intestates; and the testator, therefore, must have intended that law, and no other. But it is said, the intestate law cannot be applied to the real estate under this devise, because this case is not one of intestacy. The answer is

plain. The directions of the intestate law are applied to the present case, because such is the testator's *will*. His referring to that law and ordering the residue of his estate to be divided as the law directs, makes it part of his will, as much so as if he had inserted in the will the very directions of the intestate law in the case of a man dying without issue, leaving a wife, and two half-sisters. The second item of the will stands then precisely as if the testator had said "the residue of my estate both real and personal, shall be divided between my said wife Elizabeth, and my two half sisters, viz:—Ruth Burton and Mary Short, as the law relating to intestates' estates directs, in a case of intestacy as to said residue; giving my wife her lawful share; namely, such share as she would take under the intestate law."

The intestate law being plainly the law referred to by the testator, the directions of that law under the devise in this case must be pursued in the division of the testator's real estate, not only to designate the shares into which it is to be divided, but the quantity of interest which passes to each party; the word "estate" used by the testator, passing not only the lands, but all his title in fee simple. The widow therefore, takes an estate for her life in one moiety; and subject to such life estate, the two half sisters take an estate in fee simple in the whole. My opinion is, that the decree of the chancellor be reversed, and that partition be made among the parties according to their respective shares aforesaid: that for this purpose, the premises be divided into four equal parts; that two of those parts being, the one moiety of the whole premises, be allotted to John R. Burton and Elizabeth his wife, in her right, to hold the same in severalty, during the term of her natural life; with remainder in fee simple, to Ruth Burton and Mary Short, to be equally divided between them: that one other of said fourth parts be allotted to Joshua S. Burton and Ruth his wife, in right of the said Ruth, to hold the same in severalty, to them, and to the heirs and assigns of the said Ruth: and that the remaining one of the said fourth parts be allotted to the said Mary Short, to hold the same in severalty, to her, the said Mary Short, and to her heirs and assigns.

HARRINGTON, *Justice*:—I think the intention of this will is very plain, so plain as to control the technical force of the words, if there was any conflict, which I think there is not. The testator was without children, and his heirs at law were two half sisters. His wife was evidently an object of his bounty, and to advance her was clearly the reason of his making a will. This he does largely by bequests

of personal property, slaves, and a sum of \$500 in money, and then comes the provision that the residue of his estate, both real and personal, shall be divided between his said wife, Elizabeth, and his two half sisters, viz: Ruth Burton and Mary Short, as the law directs, giving his said wife her lawful part of the said residue. There can scarcely be a doubt that he meant by this to leave the division and distribution of his real estate as the law would dispose of it in case of intestacy; for though he made a will, it is evident that it was made for other purposes than that of disposing of the land out of its legal course of descent, that purpose was answered by the liberal advancement of his wife out of the personality; and when he came to the land he merely expresses the will and desire that it shall be divided between his wife and two half sisters as the law directs, giving to the wife her lawful part thereof. I know of no terms in which he could have more plainly expressed his purpose not to controvert the legal descent of the land, or in other words to leave it precisely as if he had made no will; nor can there be any doubt as to what law of descent he referred to; there is but one law regulating the descent as between widow and heir at law, and that is the intestate law of 1827; the act of 1816 is an act which fixes the widow's right of dower as against creditors, and protects it from the incumbrances of the husband.

In my opinion, then, the widow of John C. Burton took under the will of her husband one half of his real estate for life, and the two half sisters the other half in fee, with remainder also in fee in the half devised to the widow.

It is true, that where a devise is to stocks and representatives of stocks in the same degree, and the persons are all named, they take per capita, and not per stirpes; but this is not the case of a devise to stocks and representatives of stocks; and if it were there is such a manifestation of intention as would control it. Here is not only the direction to divide the estate *between* the wife and the two half sisters, but the manner of the division is to be *as the law directs*, giving the wife her *lawful* part. By this is meant the intestate law, which directs the division to be one-third to the widow for life; or, in case there are no children or issue of children, then one half to the widow for life. This ambiguity in the will is settled by the fact appearing in the cause, that there were no children or issue of children, a fact to which we necessarily look in construing this will.

I think, therefore, that the decree of the chancellor should be reversed, so far as it directs an assignment to the widow of one-third

in fee; and that the assignment should be to her of one moiety, but only for life.

LAYTON, Justice:—We all agree, that the testator, by the use of the words, “the residue of my estate both real and personal,” intended to dispose of the residue of his real estate *in fee*: because unless we give to the word “estate” as used in this will, that enlarged signification, the half sisters of the testator would take, under the will, but an estate for life, for he uses no words of inheritance, and he would have died intestate as to the fee.

It is manifest the testator did not intend to die intestate of any portion of his estate. It appears then, that he has devised the residue of his real estate *in fee*, to his wife, Elizabeth, and to his two half sisters, Ruth Burton and Mary Short. That he intended to give to his wife an estate of inheritance in his real estate, may be gathered from the facts, 1st. That she is evidently the peculiar object of his bounty; and 2d. That he very well knew, that without any will at all, she would have taken just such an estate under the intestate law, as that which the construction contended for assigns her. But he intended to enlarge her interest in his real estate, by devising a portion of it to her in fee. Further, such a construction as the one referred to, does, in my judgment, vacate that part of the will altogether. If the testator has devised only the same estate that the law would give, the devisees take by descent, and not by devise.

The next question is, as to the quantum, or part, of the estate which the testator intended his wife and two half sisters should take. I think he intended his wife should have the one half of his estate *in fee*, and his two half sisters the other half in fee. He devises his estate in the residue, to his wife, Elizabeth, *and* to his two half sisters; thus showing by the use, and position of the copulative conjunction *and*, that he intended to place his wife in apposition, and equal in interest to his two half sisters. This idea is rendered the more certain, by the express direction he has made of the mode in which it should be divided; and of the “part,” or quantum which his wife should take. The fee having been disposed of to his wife, and two half sisters, “he desires,” that the same shall be “divided between” them, “as the law directs,” giving his said wife her lawful part of the said *residue*:—what residue? why the *residue in fee*, of his real estate. He refers, I think, by the words “as the law directs,” to the intestate law of this State, as the only law applicable to the division of real estate, between the wife and heirs at law of a deceased man: and with a view only of ascertaining the part, or quan-

tity, or number of acres that each should take, does he refer to this law. He knew the condition of his family, that he had no issue, and he refers to the law for the division of his real estate, for the sake of convenience, and of brevity of expression.

This is a question of construction entirely, and it strikes me, that the construction I have given to this will, is the one most consonant with the testator's *intention*. It is a known rule in the construction of wills, that the intention of the testator is to govern, whenever that intention can be clearly ascertained.

Additionally, I would remark, that the testator having disposed of the whole of his interest in the residue of his real estate, desired that the same should be divided between his wife and his two sisters. I cannot see how that division can be effected in this court, according to the construction that the wife takes but a life estate. In such case no complete division can take place till the death of the wife. The only partition which could now be effected between the parties, would be to assign to the wife one half of the devised premises for term of her life, and the other half to the two sisters, their heirs and assigns. No division of the inheritance of the wife's half could take place till after her death. Then another partition of the premises must be made. In what manner shall that partition be made between the sisters, after the death of the wife? Of the one half theretofore possessed by the wife, for her life? or would the *whole* of the real estate of the testator, including the half formerly assigned to the sisters, be regarded as the estate to be divided? This would appear to be the reasonable course of proceeding in partition.

The construction I give to the will, disengages the subject of these difficulties, and effectuates a full, perfect and entire division at once, between the devisees, the objects of the testator's bounty; and this appears to have been the desire of the testator.

Decree reversed and assignment ordered in moieties, one half to John R. Burton and wife for life; the other half to be divided equally, in severalty, in fee, between Joshua S. Burton and wife and Mary Short.

Ridgely, for appellants.

Houston, for appellees.

SUPERIOR COURT.

FALL SESSIONS,

1843.

WILLIAM L. HEARN and wife and others *vs.* WILLIAM H. ROSS,
WILLIAM RIDER and others.

A *will* cannot be varied or explained by parol evidence, unless there be some latent ambiguity.

But parol evidence is admissible to prove that the paper propounded as a will was executed through fraud or mistake; or other parol evidence which denies the existence of the will.

The accidental omission of one of several tracts of land intended to be devised will not destroy the will, though the testator designed an equal distribution of his estate which this accident disturbs; and though the omission was not discovered by the testator.

THIS was an issue of *devisavit vel non* sent by the Register of wills of Sussex county, to try the validity of the will of Caleb Ross, dec'd., dated the 5th of October, 1842. The case was heard on the 15th of October, 1843.

The respondents proved the *factum*, and the general competency of the testator to make a will, and rested.

The plaintiffs then opened against the will, and stated the objections to be 1st. That Caleb Ross' naturally strong mind was much weakened by disease, and other causes. 2d. That the paper propounded as the will was drawn from written instructions carefully prepared by the testator in two drafts; but it materially varied from the instructions, and was executed without being read over or examined by Mr. Ross, who never knew of the discrepancies.

One discrepancy was that a tract of land worth \$1,800 to \$2,000, contained in the statement of instructions, and designed to be devised to Wm. L. Hearn, was altogether omitted in the prepared will.

The testator set a valuation on all his real estate, thirty tracts in all, valued at \$68,050 and intended to divide it equally according to that valuation. The omission of this tract disturbed the whole arrangement.

The tracts directed to be devised to Wm. L. Hearn, according to this valuation were eleven, valued at \$16,200. The will gave him only nine tracts, whose valuation would be only \$14,000; whilst these tracts descending as intestate to all the children, would increase the shares of Wm. Ross, Rider and Paynter, who already had their full share, very considerably. The plaintiffs' counsel contended, that if they established this discrepancy, it would be for the other side to show that Caleb Ross knew of it, or this paper was not his will: for this purpose they called

Elisha D. Cullen, Esq., sworn.—I was employed by Mr. Ross to draft his will. *Qu.*—Had you written instructions, or any original draft of this will? *Ans.*—I had, and still have it. Produce it and state whether the will now propounded does not vary materially from those instructions. Objected to.

Frame.—Our object is to show that Ross gave Mr. Cullen written instructions as to his will; that Mr. Cullen drew out a will, faithfully carrying out these instructions; but on making a fair copy of the will he accidentally omitted an important tract of land, intended to be devised to Wm. L. Hearn and wife, and that this copy was executed by Caleb Ross without any knowledge of this omission. We wish to examine Mr. Cullen for this purpose.

Cullen and Ridgely.—A mistake or omission in drawing out the will from instructions, will not vitiate the will. Such a variance cannot be proved by parol against the written will.

1st. How can the omission to devise one tract of land as ordered by the instructions affect the other devises? Are not the other devises still the will of the testator? This is not a new case; it has often happened before. (*11 Johns. Rep. 201, Jackson vs. Sill et al.; 14 Ibid 1, Mann et al. vs. Mann; 1 Wend. Rep. 541; 2 Vern. Rep. 98, 233; 2 Wm's. Ex'r. 736; 1 Ibid 201-2.*)

The cases in England never declare against a will because of an omission; they establish it with the omitted item. Parol evidence to show an error in a will cannot be admitted unless there is an ambiguity on the face of the will. (*3 Eng. Ecc. Rep. 289, Draper vs. Hitch; 4 Ibid 204, Harrison vs. Stone; 1 Ib. 432, Faucet vs. Jones 452; 2 Ib. 506, Travers and Edgell vs. Miller; 2 Ib. 500, Bayldon vs. Bayldon.*)

If there is a mistake in this will by the omission of a tract of land, how can it be rectified? Not by setting aside this will. That would be to increase the mistake.

Mistakes in wills may be rectified in chancery. (*1 Mad. Chy.*

66-8, 443; 4 *Vesey* 45; 2 *Atk.* 372; 4 *Vesey* 675; 4 *Vesey* 51-7; 1 *Johns. Ch. Ca.* 231.)

2d. The evidence offered is not admissible to defeat this will, because the act of assembly provides that a will formally executed shall not be *altered* or revoked except by writing under seal. (*Dig. 556.*)

3d. To declare the whole will void, because the intention of the testator had not been carried out as to a part, would be to annul every will in which the testator does not happen to express his own will in a lawful form.

The residuary clause will not carry after acquired property; yet in nine cases in ten the testator thinks it will. Shall this mistake vitiate the whole will. The after acquired property would go in that case as the omitted farm here would go, not under the will but as intestate property.

Then if the evidence now offered cannot have any effect to destroy this will, it is not pertinent to the issue, and is inadmissible.

Parol evidence of a mistake in a will, or an omission from a will, is not admissible to destroy the will.

If you can prove by parol that an item of property is omitted by mistake, it would be equally right to prove by parol that an item devised to A. was intended for B. This would be to repeal the statute of wills.

The evidence of an omission of an item of property is not admissible to defeat the whole will any more than the failure of a devise as intended; and if the evidence falls short of that, it is not pertinent to the issue of *devisavit vel non*. Latent ambiguities may always be explained by parol. (*Talbot's cases* 240, *Brown vs. Selvyn*; 7 *Term Rep.* 138, *Walpole vs. Chalmondeley*; 6 *Ibid.* 671, *Thomas vs. Thomas*; 11 *East 441*, *Doe dem, Brown vs. Brown*; 3 *Taunt.* 147; *Shelford Lun.* 303, 333.) A will may be established in part and avoided as to part.

Houston and Frame contra.—The evidence offered is not for the purpose of contradicting, varying, or adding to the paper propounded as the will of Caled Ross, but of denying its legal existence.

This is the principle of common law. Parol evidence is admissible to deny an instrument; but not to contradict or alter it. (3 *Stark Evid.* 995-6, 1015; 8 *Term Rep.* 147.)

It may be said that the case last cited was a case of fraud, but how can that vary the matter in a court of *law*. Suppose the omission in this case to have been designed the will would be void;

can it be otherwise if the omission was by mistake? Whether fraudulently or by mistake, if the testator was deceived it avoids the will. (21 *Law Lib.* 230; 1 *Harr. Rep.* 454, *Chandler vs. Ferris*.)

In all the cases cited on the other side, the parol evidence was offered not to deny the will, but to explain it in its construction.

The cases are in relation to personal property, and until recently the bequest of personality need not have been signed; consequently, the court never set aside a will for variance from instructions, because the instructions would be brought in and tacked on to the will as a part of it.

How does this question come up? It is an issue from the register to try whether this is or is not the will of Caleb Ross. The jury must find yea or nay. Is it the will? Not a part of the will—not the will so far as it goes—but the will, the entire will. Then suppose we prove beyond a doubt that he intended, and thought he was carrying out that intention, to devise a farm to William L. Hearn and wife, when that farm was totally omitted and the equality of distribution among his children thus broken up. Can the jury say that this is his will? And if such evidence proves that it is not his will, is it not admissible? Why not?

It is said, it is not proper to receive parol evidence as against a written instrument; that this would be evading if not repealing the statute of wills. I admit that parol evidence cannot be received to change, vary, add to, or restrict a writing which is required by the statute of wills, or of frauds, to be in writing. Is that our object in offering this evidence, to explain, add to, vary, expound or supersede by substitution, the paper propounded as the will of Caleb Ross? For no such purpose is it offered, but to defeat it; to show that it has not, and never has had, any legal existence or validity as the will of Caleb Ross. It cannot be his will without his volition, without his intention to make it his will, just as it is.

Parol evidence is offered in connection with writings in several cases, and the admissibility depends on different circumstances:—
1. Where there is a latent ambiguity not appearing on the face of the instrument, but appearing by parol when the instrument is about to be enforced, parol evidence is admissible to explain the ambiguity. Such evidence does not go to defeat but to set up and carry out the instrument. Where the ambiguity is patent, appearing on the instrument, parol evidence is not admissible. 2. Where the attempt is to rectify a written instrument by parol (which cases are generally in chancery) on the ground of mistake, the rule is directly the re-

verse, and the court will not rectify the mistake by parol, unless the mistake is patent on the face of the instrument. Almost all the cases cited on the other side, are cases of this kind. The object in all such cases is not to defeat, but to perfect the instrument. 3. Cases in the ecclesiastical courts, where the proceeding is of a special character for the purpose of proving the will. Testaments in England (until lately) were not governed by the statute of frauds; any thing in writing might be propounded as a will of personalty. What is the question in these cases in the ecclesiastical courts? They all arise on testaments of personal property, and the object in all of them is to set up the testament, in which the controversy is often between the testament and the instructions, either of which may be propounded and admitted, or both together. In any such proceeding, they establish whatever is proved to have been the intention of the testator:—they are bound down to no such issue as this whether one paper unchanged, unaltered, is the last will and testament. Such trials in England take place on feigned issues out of chancery or actions of ejectment, tried in the common law courts. Where is there such a case in which extrinsic evidence tending to show the paper propounded as the will, is not the will, has been rejected as inadmissible. The only case having any resemblance to it is the case cited from *7 Term Rep.* 138.

Mr. Bates in reply:—The paper propounded as the will of Caleb Ross is proved to have been executed with particular care, before seven witnesses, by a man in full possession of an unusually sharp intellect.

It is objected to this will, thus proved, that there was a certain paper writing placed by him, some time before, in the hands of Mr. Cullen, which contained, not any thing inconsistent with this will, but one other thing not contained in the will. Which are we to take for the will, the informal note or the formal particularly executed will?

The proof of this paper writing is inadmissible:—1st. As varying a written instrument. 2d. As not tending to prove the issue.

It does not assume to question any of the dispositions contained in Ross' will, but only assumes that it contains something not in the will.

This is the last will, and a valid will although it do not contain all the testator's property. Nothing is more usual than to omit some property. Hence the origin of a residuary clause. In this case there does not happen to be a residuary bequest, but the consequence

only is that Mr. Ross died intestate of the two hundred and fifty acres of land accidentally omitted, if such omission was accidental.

If the omission to insert a farm that was intended to be devised will set aside a will, the omission of a horse or a cow would be equally fatal, provided such intention can be proved.

The evidence is not admissible because it would violate the statute of wills, and open the door to all the mischiefs intended to be shut out by the statute of frauds. It would be no use to provide that last wills shall be executed in a formal way, if parol evidence of intention were admissible to defeat or explain the will. And directions in writing are no better in this respect than oral declarations of intention. Both are merged in the sealed instrument; and are not to be controlled by such evidence. Nothing can be proved to invalidate the will short of *fraud*. (8 T. Rep. 147; 7 Ibid 138.)

By the Court:

HARRINGTON, Judge:—

First. Parol evidence is inadmissible to add to, take from, vary, or explain a written instrument like this. A last will and testament must by our statute of wills, be in writing, and executed with certain formalities. If a paper so executed could be varied by parol, it would repeal the statute.

2d. On an issue touching the legal existence or validity of such an instrument, parol evidence wholly denying it is admissible; as that a paper was either fraudulently or otherwise imposed upon a testator and executed by him ignorantly as his will, which was not his will. (8 Term Rep. 147, *Doe ex dem., Small vs. Allen.*) This was a case of *fraud*; but I cannot perceive that there is any difference on the question of evidence, whether the testator through fraud or through mistake signs a paper as his will which is not his will. Thus if a testator directed a certain farm to be given by his will to A. B., and the draftsman, either fraudulently or by mistake, gave it to C. D., and the will was executed in the assurance and belief that it was written according to the directions, evidence of the mistake would, I apprehend, be admissible on an issue of *devisavit vel non*, because it would prove that the paper offered, at least in reference to this devise, was not the will of the testator. And the will not being capable in this court, if anywhere, of being established in part and rejected in part, the issue must on such evidence be found *against* the will.

3d. The evidence offered in this case, is that by mistake a certain farm which the testator intended to devise to one of his children,

was omitted from the will, and the omission was not made known to or discovered by the testator when he executed the will. Is this evidence admissible on the present issue? Does it show, or tend to show, that the will which was executed was not the will of Caleb Ross? It is not pretended that there is any thing in that will which is not strictly according to the wish and intention of the testator; it follows, so far as it goes, the directions given to the draftsman; the testator has not been made either by fraud or mistake to express any thing that he did not mean. But the proposition is that because he had a further will in relation to other property which he by accident did not express, that therefore all he did express and execute, though admitted to be according to his intention, is not his will. Can that be so. If it is so, then the omission of any devise or bequest however unimportant, which the testator could be proved to have intended to insert in his will; nay the failure of any devise, though by the ignorance of the draftsman, to carry the full estate intended, would vitiate the whole will.

In our view, parol evidence may be given on an issue like this, to show that the testator, either fraudulently or by mistake, has been made to express an intention that he did not entertain, for this denies the will; but that evidence, which while it admits the will so far as it goes, seeks to controvert it by showing a *further* intention in relation to *other* property, is not admissible.

There is no conflict between this opinion and the case of *Chandler vs. Ferris*. In that case the will as written, was essentially different from the instructions, giving the property for purposes and on an event not intended by the instructions; and the court told the jury if this was proved, and they were satisfied by the evidence that the testator did not know and approve of these deviations from his instructions, then it was not his will. If there was any error in the charge given to the jury in that case, it was in not giving sufficient stress to the fact of the execution of the will as affording strong presumption that the testator knew of the deviations and adopted them. Yet notwithstanding such presumption, if the jury were satisfied by evidence that he did not know or approve of the deviations, it necessarily resulted that the paper executed was not his will, because it made him dispose of his property as he had not intended to dispose of it. No such thing can be said of the paper now propounded as the will of Caleb Ross, if established. It is his will in every word and line of it; though it may also have been his intention, which he accidentally failed to express, to devise another farm which is omitted. Evidence

of this kind would be admitted in the probate courts in England, for the purpose of perfecting the will, at least as to personality; and the will would be admitted to probate together with the instructions. (*2 Ecc. Rep. 509, Bayldon vs. Bayldon et al.*) Such is the real effect of the evidence, not to destroy the will, for it contradicts nothing in the will, but to perfect it according to the intention of the testator, and enlarge the devise to Wm. L. Hearn and wife, by the insertion of the farm accidentally omitted. That cannot be done in this court, but it does not follow because we cannot provide a remedy for this mistake, that it is therefore to destroy the whole will.

Evidence ruled out.

This ended the case, and the jury returned a verdict in favor of the will.

Frame and Houston for the caveators.

Ridgely, Cullen and Bates for the will.



JOHN MORRIS vs. DAVID BURTON, surviving partner of D. & D. BURTON.

Where the plaintiff counts generally and also specially, and fails to prove the *special contract*, he may recover on the common counts. But if he prove a *different special contract* he can recover neither on the special nor general counts.

CAPIAS CASE. The declaration contained a special count on an agreement by defendants to take the plaintiff's son into their employment for one month, at five dollars wages, with meat, drink, &c., and then to take him as an apprentice to the trade of *tanning and currying*. There were other counts for work and labor, &c. The breaches assigned were that defendants would not execute the indentures; did not pay, &c. &c.

The boy went into the service of defendants and continued about a year at the tanning and currying business, when he was turned off. One witness proved that the defendants agreed to take the boy as an apprentice to the *currying and finishing business*, which is distinct from tanning; another, that they had agreed to take him as an apprentice generally.

The plaintiff having closed,

Mr. Houston, for defendants, moved a nonsuit, on the ground of a variance; the plaintiff having proved a different contract from the one declared on.

Houston.—The first and second counts are on an express contract to learn the art of tanning and currying; the proof is of a contract to learn the business of currying and finishing, and the witness proves that these are distinct trades.

The plaintiff has then proved a special agreement, but a different agreement from the one declared on. He cannot recover on the special counts because of the variance; and he cannot recover on the common counts because he has proved a special contract. The only case in which the party can recover under his general counts, is after having failed to prove any special contract; for the presumption then is that there was none. But if he proves any special contract he must recover on it and cannot recover out of it. (*1 Leigh N. P.* 77; *Bull. N. P.* 139; *2 Stark. Ev.* 96, n. 1; *18 Johns. Rep.* 546; *2 Harr. Rep.* 484, *Porter vs. Beltzhoover*.)

Cullen and Ridgely contra, cited *1 Ch. Plead.* 299, 8 n.; *10 Johns. Rep.* 35-6; *5 Mass. Rep.* 391; *17 Eng. C. Law Rep.* 19; *7 Johns. Rep.* 132.)

The Court.—The motion for a nonsuit is founded on the assumption of the fact, that a different special agreement has been proved from the one declared on; and it is contended, that the plaintiff cannot recover on the special count because of the variance, nor on the common counts, because a special agreement is proved.

Where the plaintiff declares on a special contract and fails to prove any contract, but proves such facts as would enable him to recover without any special agreement, he may recover on the general counts; but where he fails to prove the special contract declared on, but does prove a different special agreement he cannot, according to the older cases and authorities, and also the case of *Porter vs. Beltzhoover*, which follows these decisions, recover either on the special count, because of the variance, or on the common counts, because of the proof of a special agreement. Some of the later authorities, particularly the case cited from *5 Mass. Rep.* 391, hold the contrary.

In the present case the proof of service is nearly all of it under neither of the special agreements; that laid, or that proved. The agreement laid was for the hire of the boy, one month at \$5, and for the binding the boy at the expiration of that month to learn the tanning business; the agreement proved is either that, or an agreement

like it for binding to the currying business. The proof is that the boy was not bound at the end of the month, but continued to do work and labor for a whole year. We think it competent for him to recover for this labor performed out of the contract, on the common counts for work and labor; and even as to the proof of the special contract, it is such as would prevent us from interfering on the ground of variance.

The plaintiff had a verdict for \$58.

Cullen and Ridgely, for plaintiff.

Houston, for defendants.



The STATE for the use of DAVID PEPPER and Wife vs. COARD
WARRINGTON, Ex'r. of ANN WARRINGTON, dec'd.

A bequest of personal property for life, without any further or other limitation of it over, seems to be an absolute gift.

Personal property may be limited over after a bequest for life, by way of executory bequest.

No limitation can be made of specific chattels. the use whereof consists in the consumption.

NARR. in assumpsit. Demurrer. Case stated.

Joseph Warrington by his last will and testament, bequeathed to his wife Ann "one-third of his personal estate *during widowhood*, and after her death or marriage," then to his seven daughters (of whom plaintiff's wife was one) to be equally divided among them. In pursuance of this bequest the executor of Joseph Warrington paid to Ann Warrington \$278, as a third of the clear residue of the personal estate of Joseph Warrington. The widow, Ann Warrington, afterwards died, having made Coard Warrington, the defendant, her executor and residuary legatee, to whose hands assets came sufficient to pay over said legacy or bequest. This suit was instituted by Pepper and wife, one of the daughters of Joseph Warrington, and devisee over of said legacy after the life interest of Ann Warrington was spent, to recover from Mrs. Warrington's executor the one-seventh of said legacy.

Woolten, in support of the demurrer.—They cannot recover 1st Because the gift to the wife of this personal property for life was an

absolute gift. (a) 2d. It was not a sum due from Mrs. Warrington in her lifetime, and cannot be proved as a debt against her estate.

(a) *The State use of Betsy Savin vs. William Savin.*—Debt on an administration bond. Narr. Pleas, &c. Referred to John M. Clayton, Samuel M. Harrington, and Joseph P. Comegys, Esqs.; on these facts agreed to, viz:—John B. Savin by will, gave to his wife, Betsy Savin, “a third part of all his personal estate during her natural life.” He also willed that she should “have and enjoy, during her natural life, one third of all his real estate; and at her death, that the aforesaid one third part of his real estate, should be given to his four youngest children, their heirs and assigns forever.” He bequeathed “the remaining two thirds of his personal estate, to be equally divided between his four oldest children.” He bequeathed “the remaining two-thirds of all his real estate, to his four youngest children, their heirs and assigns forever, to be equally divided among them.” The clear personal estate of said Savin, amounted to \$6,087 40.

It was agreed that the referees should decide, whether Mrs. Savin was entitled under the will, to one third of the personal estate for life only, or absolutely and forever; and if only for life, whether she was entitled to any part of it as intestate property after her life estate was spent, and also upon what security (if any) the defendant shall pay over the share to which she may be considered entitled.

The argument for the plaintiff was, that a bequest of personal property for life, without any limitation or disposition over, or any indication of such intention in the will, was an absolute gift of the property.

1. It was the *intention* of the testator to dispose of *all* his property, which he has not done if this is a mere life estate in Mrs. Savin. The will shows this. “The remaining two thirds of my personal estate,” as if one third had been absolutely disposed of. The law does not favor intestacy when there is a will, if the will can be so construed as to include all.

2. Before the introduction of executory devises, the law was well settled that a gift of personal property *for life*, whether by will or otherwise, was a gift of the whole property. The rule was without exception. It was founded in consideration of the changeable and perishable character of the property, and the inconvenience of having successive owners of it, or limiting it in perpetuity. A limitation of personal property for life, was as full a disposition of it, as a limitation to one and his heirs, was of real property. No remainder could be limited after it. All such were *void*. The estate for life was in contemplation of law, larger than any number of years, or other interest in chattels. And as nothing remains in the donor to be limited over, so nothing could descend to his heirs by way of reversion or intestacy. (18 *Law Lib.* 121, ch. 4 § 4; 2 *Blac. Com.* 174, ch. 11;

Ridgely, contra.—1st. This is a good bequest in remainder though of a chattel interest. Things which are consumed in the use go absolutely to the first taker; specific bequests may be limited over. (*2 Wms. Ex'r.* 858; *2 Kent Com.* 352; *2 Wms. Ex'r.* 859; *2 Term Rep.* 376; *22 Law Lib.* 132-3.) 2d. If plaintiffs were entitled to a

2 Bac. Ab. 76, [*Devises K*] *Fearne* 401-2; *8 Co. Rep.* 128, *Manning's case.*

When the doctrine of executory devises was established, the rule was so far relaxed as to allow of ulterior dispositions of personal property after a life estate, *in this form*, (*8 Co. 188*; *1 Mad. Rep.* 260,) not on the idea that any thing remained in the donor to dispose of after an absolute gift for life, but on the notion of an *executory contingent* disposition of the thing at the time of giving the life estate; and unless such executory devise be in fact made by the testator, the bequest of the thing for life gives an absolute interest. So of an executory devise of *real estate*. By the common law a devise to A and his heirs, was an absolute disposition of the whole estate, and nothing could be limited over in remainder; but *by way of executory devise*, a further contingent and executory disposition of the land might be made. Yet if such disposition be not made, the first devise carries the fee. So Mr. Savin might have made a further disposition of this personal estate, after the gift for life to his wife, and such disposition would have been good by way of executory devise; but not having done so his bequest must be taken upon the settled principles of the old law, to carry the whole interest in the personality.

The intention though much clearer than in this case, cannot be permitted to govern against settled principles of law. Most of the applications of the rule in Shelley's case show this. A bequest of personal property to *A and his issue*, or to *A. and his issue male*, vests the property absolutely, and excludes all ulterior limitations. (*Fearne* 463, &c.) So a bequest to *A. and if he die without issue male, then over to B. or to A. for life*, and if he die without issue, *then over to B.*; the absolute estate vests in *A. forever*. (*Fearne* 478, &c.; *18 Law Lib.* 122, &c.; *8 Ib.* 107; *3 Ves. jr.* 101-2; *1 Mad. Rep.* 256-7; *3 Meriv. Rep.* 176, 183; *1 Lev. Rep.* 290; *Ram. on Wills* 107; *1 Russ.* 264; *Ward Leg.* 122, 123,) which cases resolve the doubt of *Mr. Fearne*, pp. 486-7-8, and the case of *Clare vs. Clare* (*Ca. temp. Talbot* 21) where the estate went over by force of the residuary bequest, which was in effect an executory bequest. The case of *Eyres vs. Faulkland* (*1 Salk.* 231) is also distinguishable. There the executor took the residue of the term as residuary legatee, on the common law principle, that the executor is entitled beneficially and absolutely to all the residue of personal estate undisposed of. It was a case, too, of chattels real. See also, *Fearne* 487-8; *1 P. Wms.* 666.

share of this property on the death of Mrs. Warrington, from whom were they entitled to recover it? It went into the possession of the executor of Mrs. W., as a part of her estate, and he was bound to pay it over to the party entitled to it. The non-payment of it is a breach of his bond.

3. A considerable portion of Mr. Savin's personal property consisted of articles of which the use consisted in the consumption, and as to this, undoubtedly, not even an executory devise could be made after a bequest *for life*. (3 *Meriv.* 190; *Ward on Legacies* 121.)

The defendant's counsel contended—1st. That Mrs. Savin was not entitled to the one third part of this personal estate absolutely, but only for life; and that after her death the same should be distributed as intestate property: 2d. That the bequest for life not being of specific chattels, but of one third of the whole estate, (after conversion into money) the widow was not entitled to receive the principal but only the interest during her life.

By the old law, the legatee of a chattel for life took it absolutely, and every limitation over was void; because an estate for life was considered the highest possible interest of which a chattel was capable. So that after a disposition for life, nothing remained to be given over; (*Brooke tit. Devise; Co. Rep.* 94;) but this doctrine is exploded, and it is now settled that though the bequest of chattels without words of limitation is an absolute gift, yet that the testator may by the use of such words, restrict such a bequest to an interest for the life of the legatee. No case can be found in which such restriction has been rejected, merely because the remainder was not disposed of by the will. The old doctrine was not that because you could not limit a remainder, *therefore* a bequest for life was a gift of the absolute property; but because the bequest for life was an absolute gift forever, *therefore* no remainder could be limited. So, the present doctrine is not that because you may now limit a remainder, *therefore*, you may bequeath a life estate in a chattel; but because you may now bequeath a life estate, *therefore*, you can limit a remainder. A bequest to A. for life, remainder to B. is now good as to both, not that the second disposition restrains the first, but the first being for life only there remains something more to be disposed of. The bequest over may serve to show the intent of the testator, but cannot effect the first express gift for life. Nothing in such case is needed to show the intent. (*Ca. Temp. Talbot* 21; *Fearne* 487, [374;] 1 *Salk.* 231; 1 *Ld. Ray.* 235; 6 *Cruise* 267; 3 *Bro. Ch. Rep.* 578; *Fearne* 490, no. 1.)

The distinction between an executory devise and a remainder, is not practical in its application to the present case. The gift of a chattel for life, is a gift of the use only, and the property if given over at all, is given to him in remainder, subject to the use of the tenant for life; if not given over it remains so subject, in the hands of the donor, or in case of bequest,

The executor of Joseph Warrington could not be sued, because he was bound to pay to the legatee for life, on filing the inventory. (2 *Wms. Ex'r.* 859; 2 *Kent Com.* 352.)

Wootten replied:—The authorities cited prove that the executor is justified in paying to the tenant for life, only under certain circumstances, on filing an inventory and statement that they are held only for life.

The case assumes that Mrs. Warrington was not bound to pay this money to the legatees over during her life, and her executor or estate are not entitled to the possession of it after her death. How then can a suit lie against the executor of Mrs. Warrington for a debt not due from his testatrix, or for money not in his hands as executor?

The Court gave judgment for plaintiff.

Ridgely, for plaintiff.

Wootten, for defendant.

in the devisor or his next of kin, or residuary devisee. (1 *P. Wms.* 6, 502-3; 3 *Meriv.* 190-3; 2 *Kent Com.* 352; 5 *Johns. Ch. Rep.* 334-6.) The only exception, is the case of such chattels the use of which consists in the consumption; such as provisions, wine, provender, &c.; where the gift for life is of necessity an absolute disposition; where the thing itself is specifically bequeathed; and where its use cannot be separated from its consumption. (2 *Wms. Ex'rs.* 258; 18 *Law Lib.* 121; 3 *Meriv.* 190; 7 *Ves. jr.* 89; 2 *Kent Com.* 353.)

Whatever an executor takes by the law of England as undisposed of, residue, goes by our act, (*Dig.* 258) as intestate property to the next of kin; so that if the argument is good, that there a testator means to give to his executor whatever he does not dispose of by his will, it is equally good here as a valid disposition to the next of kin.

The argument that Mr. Savin did not intend to die intestate of any of his property, can have no force in the construction of his intention as to the wife's share of the personal property, because the intention there is express "during her natural life."

2d. This gift to the widow is residuary and not specific. It is of the one third part of his personal estate, necessarily after payment of debts, and therefore after administration and conversion into money. The personal estate being thus converted into money, she is entitled to the interest (that is the use) of it only; and not to the principal. (2 *Wms. Ex'rs.* 858-9; 3 *Meriv.* 190; 3 *Ves. jr.* 313; 7 *Ib.* 89, 137.)

The Referees reported "that the said Betsy Savin, the widow of the said John B. Savin deceased, under and by force of the will of her said late husband,

BENAIAH WATSON, Treasurer of a ditch company leading, &c. vs.
CORNELIUS LOFLAND, for the use of DAVID LOFLAND.

The treasurer of a ditch company, under the general ditch law, cannot be sued on orders drawn by the managers *before acceptance*.

Such orders should be drawn by both managers.

The liability to laborers is on the part of the managers, and not of the treasurer.

CERTIORARI to Justice Welch.

Record. C. Lofland, use of D. Lofland vs. B. Watson, treasurer of the ditch co., &c. Action of debt on an order drawn by Job Sharp, one of the managers of said ditch, on the said B. Watson, treasurer.

The order was as follows:—

is entitled to the one third part of the residue of his personal estate absolutely and forever, for the following reasons. Originally there could be no limitation over of a chattel, and a gift for life carried the absolute interest. This is still the law as to such articles of personal property of which the use consists in the consumption. But when the law came to be settled with regard to executory devises, it was held as a part of this peculiar and very technical branch of the law that in regard to such chattels as might be used without being consumed, a limitation after a life estate would be good by way of *executory devise*. In this form, and only in this form, have we been able to find any judicial sanction for a departure from the old common law principle, that a gift of a chattel for life, is an absolute gift of it. In no case has it been held that the donor, grantor or devisor of chattels for life, by will or otherwise, could retain any interest in the chattel in himself for his own benefit, or that of his personal representatives; or could dispose of such interest to another, unless in the form of an executory devise made at the time of the bequest of the life estate.

In the case before us, though we have little doubt of the intention of Mr. Savin to give his widow but a life estate, he has not effected that intention in the only mode known to the law, and we are constrained to hold it an absolute gift of the one third of his personal estate. There is no executory devise, or other limitation or disposition of this third part after the life estate should be spent, and this is the more remarkable, as there is such a limitation as to the real estate, of which he also devised a third part to his said wife for life."

*The Court rendered judgment on this report, for plaintiff.
Frame, for plaintiff.
Bates, for defendant.*

Mr. Benaiah Watson, treasurer of a ditch leading from the lands of David C. Pennewill into Russel's mill-pond, pay to Cornelius Lofland, one dollar and twenty-five cents, for two days' work on said ditch, at 62½ per day, for the use of Sarah Hevaloe, widow of Jesse Hevaloe.

\$1 25.

(Signed) Job SHARP, Manager.

Aug. 12, 1842.

I transfer the within order to D. Lofland.

(Signed) CORNELIUS LOFLAND.

The parties appeared on the day of trial; "defendant disputed the demand, and plead the order not accepted and no money belonging to said ditch in his hands." Judgment for plaintiff.

Exceptions:—1st. That the cause of action was not within the magistrate's jurisdiction. 2d. That the plaintiff had no cause of action. 3d. That the defendant was not liable to a suit on the order before acceptance. 4th. That he was not liable without proof of funds in hands as treasurer.

The Court.—By the 8th section of the general ditch law (9 vol. 468,) the managers of any ditch company are authorized to make the ditches, and employ the laborers; and all payments are to be made by orders drawn by the managers on the treasurer. The treasurer is required by section 9, to give bond and security conditioned for the faithful performance of his trust and duty, and the payment of any money in his hands as treasurer, over to his successor, at the expiration of his office.

The liability to laborers for their wages is therefore on the part of the managers, and not on the part of the treasurer, at least before the acceptance of orders, which must be drawn by both managers, or the treasurer is not bound to accept or pay them. If he refuse to accept orders properly drawn on him by the managers, the treasurer is liable to them on his bond; but he is not liable to the holders of such orders, between whom and him there is no privity, and no obligation or promise express or implied, to pay the wages. If the orders be not accepted, they should be returned to the managers, who would be responsible on their contract with the laborers for the amount of wages. If accepted, the treasurer would be liable on his acceptance.

Judgment reversed.

Cullen, for reversal.

Houston, for affirmance.

DAVID HAZZARD (of Joseph) *vs.* JOHN H. BURTON.

A purchaser of goods at sheriff's sale, may maintain replevin for them after a demand and refusal to give them up.

It is not legal for a sheriff to sell goods not present; but the right of the purchaser of goods so sold, is good unless the sale be set aside.

REPLEVIN for a pair of oxen; cattle, sheep, &c. The goods replevied and delivered to plaintiff. Pleas, non cevit, and property in Polly Burton.

The property in question was sold at public sale by the sheriff as the property of this defendant, who disclaimed at the sale any right to it. It was there claimed by his mother, Polly Burton, who lived with him. The plaintiff, who was an execution creditor of the son, bought the property, and demanded it of the defendant, who refused to deliver it up. Much of the property was sold without being seen, having been run off by defendant, or his mother, both of whom forbid the sale.

Mr. Cullen moved a nonsuit, on the ground that there was no proof of a tortious taking. The property never was in possession of the plaintiff. He bought it at the sale as the property of the defendant, but the possession was never delivered to him. For such a case the action of replevin will not lie.

Replevin only lies upon a tortious taking; it will not lie where the caption was lawful. The narr. states that the defendant unjustly took the property of plaintiff, and held the same until, &c. The plea is non cevit, which puts in issue the taking. (1 Chitt. Plead. 119, [159 ;] 13 Com. L. Rep. 443; 7 Johns. Rep. 140; 1 Wend. Rep. 109; 15 Johns. Rep. 401; 14 Ib. 84; 10 Ib. 369; Chitty Prec. 590; 2 Selw. N. P. 896, n.) The demand by a person having a right to goods and a refusal, would be sufficient in the action of trover and conversion; but in replevin, the plaintiff must show himself to have had actual possession to sustain his allegation of a wrongful taking. Replevin will only lie where trespass will lie.

Ridgely and *Houston* contra, cited 2 Saund. Pl. & Evid. 760; 7 Johns. Rep. 143; 2 Leigh. N. P. 1325; 1 Dallas' Rep. 157; 6 Binn. 2; 3 Serg. & R. 562; 16 Ibid 300; 5 Mass. Rep. 284; 15 Ibid 359; 16 Ib. 147.

The Court.—The property in this case was bought by plaintiff at sheriff's sale as the property of defendant. On the sheriff's levy he had a sufficient property and right of possession to maintain trespass or

replevin against any one taking it unlawfully. On a sale by the sheriff the purchaser acquires an equal right of property and right of possession, and it is in proof that after the sale there was a demand and refusal by defendant to give the property up. That it was then or afterwards in defendant's possession is sufficiently proved by the officer who executed the replevin, and found the goods in defendant's hands.

Wherever there is a general property and right of immediate possession it draws to it the possession, and the party may maintain trespass or replevin. (*2 Saund. Plead. & Ev.* 760; *10 Mod.* 25; *7 T. R.* 9; *Roscoe Evid.* 377; *2 Blackford Rep.* 172.)

Nonsuit refused:—(See post *Johnson vs. Johnson.*)

Mr. Cullen now made the point that the sale was unlawful, the property not being present, and being sold in large parcels. The sheriff has no right to sell property not in his actual possession. (*14 Johns. Rep.* 352, 222; *1 Johns. Cases* 287.)

Ridgely.—The objection now taken is, that the sheriff's sale was irregular; but it has been decided by this court, that such an objection does not affect a purchaser, but must be tried in an application to set the sale aside. (*2 Harr. Rep.* 463, *Williams vs. Hickman.*) The New York cases are not applicable to our practice. There as in England, the sheriff on levying, seizes the goods and takes possession of them; here he never does so. They are left with the defendant in the execution, and if his putting them out of the way will prevent a sale, we shall never have any more sales.

In this case the property was sold without producing it, because the defendant himself prevented its production; and if the property did not bring its full value, it is the fault of the defendant himself.

The Court.—It is not a proper mode for the sheriff to sell property without having it present, nor to sell it in large parcels where it will admit of a different mode of sale; and the court would set aside such a sale for irregularity. But as to purchasers it would be a more dangerous rule to hold that their title is to be affected by any irregularity, than to hold that even such a sale as this conveys a title to the purchaser. For if purchasers are held to proof of the regularity of the sale, all property will be sacrificed at sheriff's sale for fear of buying a law suit; but if property in a particular instance is sacrificed because it is not produced, the loss will generally, as in this case, fall on the defendant, who has run it off, the practice in our state being to leave the property with the defendant after levy. To hold

such a sale void as to purchasers, would be either to change this ancient and mild practice, and oblige sheriffs to seize and carry away goods levied on, or it would put it in the power of a defendant always to prevent a sale by running off the property. We affirm, therefore, the decision of this court in *Williams vs. Hickman*, by holding the sale in the present case not illegal as it respects a purchaser of the property, though it was extremely irregular. Yet that irregularity and the consequent sacrifice of the property was produced by the defendant himself, and he ought not to complain of it.



NUTTER L. DAVIS, Adm'r. of DAVID WILSON, dec'd., d. b. app't.
vs. AARON MARSHALL, p. b. resp'dt.

Vessel owners are liable on the contracts of the master, made in the usual course of business; but not otherwise, unless they assent.

APPEAL from the judgment of a justice of the peace in an action of assumpsit for goods sold and delivered.

The defendant's testator, David Wilson, was the owner of a sloop, "the Sarah and Emily," of which one Jerry Jeffers, a coloured man, was master, trading from Slaughter creek. Jeffers sailed the vessel for a share of the freights. He sometimes took wood on freight and received only the freight; at other times, he sold the wood on account of the owner and paid over the proceeds, deducting freight; and in two instances at least, as was in proof, he bought the wood and took it to market. Wilson knew of one of these and settled without objection. The present action was for a load of oak and hickory wood, sold by Mr. Marshall to Jeffers and charged to the vessel.

The defendant gave no evidence, but insisted that the owner of the vessel was not liable for the price of the wood.

Ridgely, for defendant below, to jury.—The proof is, that Jerry sailed the Sarah and Emily out of Slaughter creek on shares for freight. Business being dull, he went into Broadkiln to look for freight, and Marshall instead of freighting, sold his wood to Jerry on his own responsibility. The vessel owner is not responsible for the price of the wood so sold.

Cullen, for plaintiff.—The wood was sold to "sloop Sarah and Emily and owners, Capt. Jerry Jeffers;" the contract was with the

captain as usual, for there was no one else to contract with. The owners are liable on such a contract. (*Abbot on Shipping*, 91, 97, 95, 103.) The wood was sold in the usual course of business to the captain, who will be deemed to have authority from the owners to make such contracts; and they will be liable. The remedy is two-fold against the master, or against the owner. (*Abbot Shippg.* 113; 15 *Mass. Rep.* 352; 6 *Cowen* 173; *Collyer on Part.* 17.)

The question is, what is the usual course of trade and employment of the vessel. The owners are liable on any contract made with the captain which is in the usual course of trade and business; and the course of trade and employment, is evidence of authority from the owners. It is proved that it was the usual course of trade and business, to send wood by this vessel on contracts of sale with the captain, Jeffers, who paid for the wood on the return of the vessel.

HARRINGTON, Judge, charged the jury:—That the liability of vessel owners on the contracts of the captain or master, depends upon the question whether the contract was made in the usual course of trade and business in which the vessel was engaged, and was within the scope of the master's authority. That authority may be proved by the usual employment of the vessel, as well as by the recognition of the owners.

If it be proved that it was customary for the captain of this vessel to buy wood for transportation and sale, and pay for it on the return from market, it is evidence that Mr. Wilson knew of, assented to, and authorized such contracts on the part of his captain, and he is liable accordingly for the price of the wood. But if the usual business of this vessel was to carry the wood of others for freight, and not to buy it on account of the vessel, then Wilson, the owner, would not be liable to Mr. Marshall for a contract made with the captain, which was thus out of the usual course of sailing this vessel. As to such a contract, it would be out of the scope of the captain's authority as agent of the owners; and they would not be liable on account of it.

The question for the jury will then be, whether it is proved to their satisfaction, that the captain, Jeffers, bought this wood within the usual course of his employment as captain of the vessel; if he did so, it is evidence of authority from the owner to make such contracts on account of the vessel, and the defendant Wilson is liable as owner of the vessel for the price of the wood. But if the purchase of wood is not proved to have been in the usual course of employment of the vessel and the usual practice of the captain, the defendant is not liable; because the purchase of the wood was not within any authority con-

ferred on the captain by the owner, and the party dealing with the captain out of the scope of his authority must look to him alone, and not to the owner, for payment.

Verdict for plaintiff.

Cullen, for plaintiff.

Ridgely, for defendant.



Lessee of GEORGE HARRIS vs JOHN BURTON, Tenant.

The acknowledgment of a deed before a notary public of the State, must be within the State.

A married woman cannot make a valid deed of her own lands, so as to bind even her own interest, without her husband being a party.

THIS was an action of ejectment for certain lands in Sussex county. The plaintiff's title rested on a deed from James B. Collins and wife to George Harris for the land in question, being the land of the wife. The deed was objected to for want of due execution and acknowledgment. The certificate of acknowledgment of the deed was as follows:—

The State of Delaware, Sussex county, ss. Be it remembered, that on the 29th day of Dec. 1840, at the city of Philadelphia, in the State of Pennsylvania, James B. Collins, party to the foregoing indenture, personally came before me, George Frame, of Sussex county, a notary and tabellion public of the State of Delaware, and did acknowledge the same indenture to be his deed: And be it further remembered, that on the thirty-first day of the month and year aforesaid, Nancy Collins, wife of the said James B. Collins, and also a party to the foregoing indenture, personally came before me, the said George Frame, at Broadkiln hundred in the said county of Sussex, and she, upon private examination taken by me apart from her said husband, did acknowledge the said indenture to be her deed, and that she executed the same willingly, without compulsion or threats, or fear of her husband's displeasure. In witness whereof, I have hereto set my hand and affixed my notarial seal at Nanticoke hundred in the county aforesaid, the day and year last aforesaid.

(Signed) *GEORGE FRAME, N. & T. P.*

Cullen.—This acknowledgment is invalid, null and void. George

Frame had no right to take the acknowledgment out of the State; such acknowledgment should have been taken by the State's commissioner there. (1 *Johns. Rep.* 497.)

Woolten.—Why should not Mr. Frame, having full authority as a notary public to take the acknowledgment of deeds in this State, equally have authority to take the acknowledgment out of the State for lands within the State? But it does not matter to us whether the acknowledgment of James B. Collins was taken regularly or not; we do not claim under James B. Collins, but under Nancy Collins, his wife, (he being now dead,) and her acknowledgment is regularly taken.

Cullen.—That position assumes that a married woman can make a deed without her husband. As to James B. Collins, this is no deed. At common law the wife could not make a deed. She is competent to do so only by force of our act of assembly, which makes the deed of a married woman "*to which her husband is also a party,*" valid against her when she is privately examined as the law directs, but not otherwise. The plain letter of the law, as well as good policy, require that this should be a joint action of husband and wife; and that the deed of the wife made without her husband, should not be valid.

Court.—The question now before the court is, whether a deed purporting to be the deed of husband and wife, acknowledged by the husband in the city of Philadelphia, in Pennsylvania, before a notary public of this State, and acknowledged by the wife before the same notary within the State can be read in evidence without proof of the execution. As to the acknowledgment of the husband, the question is whether George Frame, a notary public of this State can do an official act out of the State. The taking the acknowledgment of a deed is an official, perhaps a judicial act, and the authority of the public officer cannot extend beyond the limits of his appointment. George Frame is a notary public of the State of Delaware, appointed to act as such notary within the State, and his acts done out of the State are unofficial. The law makes provision for such acknowledgments out of the State, and there is no necessity any more than reason for extending the power of the notary beyond the limits of the State. But it is contended, that inasmuch as the lands belonged to the wife, and that her acknowledgment was taken before the notary within the State, that the deed is valid as to her. We think the policy as well as the letter of the law, requires that the husband shall

be a party to any deed in which a married woman binds herself. This is for her protection, and it is a reasonable protection.

Deed ruled out, and the plaintiff nonsuited.

Wootton, for plaintiff.

Cullen, for defendant.



NATHANIEL Y. DAVIS and Hester Ann, his wife, late Hester Ann Smith,
vs. DAVID SMITH.

A devise to two grand-sons, A. and B. "jointly, their heirs and assigns forever," is a tenancy in common, and not a joint tenancy in the devisees.

CASE STATED. David Smith devised a tract of land to his two grandsons, "John Smith and David Smith jointly, their heirs and assigns forever," on condition that they each paid fifty dollars, to Hester Ann Smith, when they arrived at age respectively. He also authorized a trustee to sell the land if he thought proper, during the minority of John Smith and David Smith, and to secure the payment of the money to the said devisees when they shall respectively arrive to the age of twenty-one years.

John Smith died under age, intestate and without issue. Nathaniel Y. Davis married Hester Ann Smith, the legatee, and administered on the estate of John Smith, one of the devisees. Qu. What estate did John and David Smith take under the will of their grandfather, an estate in joint tenancy or in common? If the former, judgment to be rendered for defendant; if the latter, judgment to be rendered for the plaintiffs.

Cullen contended that under the act respecting devises of lands, joint estates and dower, (*Dig.* 167,) no estate in joint tenancy could be created, unless the testator expressly devised "to be held as joint tenants and not as tenants in common." Such is the provision of the act, the object of which was, to do away with all constructive joint tenancies.

Ridgely claimed that this was a devise of a joint tenancy, the intention of the testator clearly being to make such an estate. The court cannot construe this a tenancy in common without rejecting the word "jointly," which is against the rules of construction that require force to be given to all the words if possible. (*Wms. Ex'r. 709-14.*)

The act of assembly cannot mean that a testator shall use the very words "to be held as joint tenants and not as tenants in common," to create a joint tenancy; if so a devise to two and the survivor of them, or to two as joint tenants, would not create a joint tenancy.

When technical words are used, the testator must be held to use them in their technical sense; hence the court cannot say that the devise to John Smith and David Smith jointly, does not create a joint estate.

Cullen.—The court cannot regard the intention of a testator, when such intention is contrary to law. The intention of this testator, even if it appears to have been to devise a joint tenancy, cannot be carried out, unless he uses the words which are necessary to create such an estate. But there is no such intent apparent in this will. The word jointly, does not necessarily mean a joint tenancy. Tenants in common or coparceners, hold the estate jointly until severance. He meant only to devise the estate to both, and the money which was to arise from the estate in case of a sale was bequeathed to them severally as they came of age.

The Court held that John Smith and David Smith took the estate as tenants in common, and not as joint tenants, and gave

Judgment for plaintiffs.

Ridgely, for defendant.

Cullen, for plaintiffs.



ISAAC MARINER, Adm'r. of PHILIP W. MARINER, d. b. app'l't. vs.
COARD BURTON'S Adm'r. p. b. resp't.

Assumpsit for use and occupation, will not lie against a person who entered into possession as a purchaser, though the contract of purchase be rescinded and the premises recovered back in ejectment.

APPEAL from the judgment of a justice of the peace. Narr. in assumpsit for use and occupation. Pleas non assumpsit, &c.

In 1836, Coard Burton contracted to sell Philip W. Mariner a house and lot for \$60, and delivered possession; the deed to be made on payment of the purchase money. Philip Mariner died, and his representatives refused to pay the purchase money; but agreed to rescind the contract. Burton brought an action of ejectment and recovered the land; and brought this action for use and occupation.

Cullen, for defendant, moved a nonst. The plaintiff shows that Mariner entered into possession of the premises under a contract of sale, and there is no evidence of abandonment of that contract. There is no evidence of a contract of renting, or of any occupation under any contract, express or implied, for the payment of rent.

The action for use and occupation will never lie unless the relation of landlord and tenant exists. (13 *Johns. Rep.* 489.) It is an action of assumpsit founded on a contract express or implied. Unless there be such contract or circumstances from which an assumpsit to pay rent can be implied, this action will not lie. The only contract proved here is a contract of sale. Even if it were proved to have been abandoned, it would leave the defendant, Mariner, in the position of a trespasser and not of a tenant. This is in truth an action for mesne profits after recovery in ejectment, which is an action of trespass sounding in tort. (13 *Johns. Rep.* 489; 2 *Taunt. Rep.* 145; 6 *Johns. Rep.* 46; *Chitty on cont.* 370-1, n. 1; 3 *Conn. Rep.* 303.)

Ridgely.—The cases from *Johnson's Rep.* proceed on the statute of the State of New York, adopting the English statute of 11 *Geo. 2 ch. 19, sec. 14*, which applies only to the case of a demise founded on the relation of landlord and tenant. The cases, therefore, are of no authority here, if our act of assembly is different. (*Dig.* 365.) Our act gives the action of assumpsit for use and occupation, in any case where the lands are occupied by permission of the plaintiff. It does not require a demise or contract of renting. (2 *Saund. Pl. & Ev.* 423, [890.] Where the defendant has entered into a contract of sale which does not take effect, he is liable in an action of assumpsit for use and occupation, if his occupation has been a beneficial one. The exceptions are where the purchase money is paid and the sale is defeated for want of title in the vendor. (2 *Taunt. Rep.* 145; 3 *Stark. Ev.* 1517-9 n.) Where the contract fails without any fault in the vendor, and the occupation of defendant is beneficial, this action will lie. (3 *Stark. Ev.* 1519, note.) In the present case the contract of sale failed because the defendant did not pay the purchase money, and agreed to rescind. His possession of the premises was altogether beneficial to him, as he paid nothing. In such case the action would lie in England under the 11 *Geo. 2*, much more under our act, which does not look to a contract but gives the action in all cases of occupation by permission of plaintiff.

Money paid on a contract which is rescinded may be recovered back in assumpsit. Why? because in such case there is an implied promise, to pay it back if the contract is defeated. Why then should

there not equally be an implied promise to pay for the use and occupation of land which the defendant occupies under a contract of purchase, which fails? (1 Term. Rep. 133; 7*Ibid* 181.)

Cullen, in reply.—There is no substantial distinction between the statute of *Geo. 2.*, in force in New York, and our act of assembly in respect of the question now under discussion, (2 *Saund. Pl. & Ev.* 420; *Digest Del. Laws* 365.) The only permission referred to by our act is that of a landlord to a tenant. No such holding by permission existed in this case. Mariner held not by permission of Burton, but as the owner, without any claim or idea of liability for rent.

The Court.—There is nothing in the case, as proved, from which a promise can be implied to pay rent. The relation of landlord and tenant never existed between Burton and Mariner; nor was there any contract for the rent of the premises. The latter took possession as vendee and owner; the contract of sale was broken up, whether with or without his consent, without placing him in the relation of a tenant, or as holding by permission of Burton. On the contrary, Burton treated him as a trespasser, and turned him out by an action of ejectment.

Our act of assembly is the same with the statute of *Geo. 2.*, its object being to give the action for use and occupation in cases of tenancy without demise by deed; but still, only in cases of tenancy or holding by permission of another under a contract, express or implied, to pay rent. Such is not this case, and the plaintiff below must be nonsuited.

Ridgely, for plaintiff.

Cullen, for defendant.



THOMAS H. TRUITT *vs.* WILLIAM F. REVILL.

A party justifying under execution process, must show the judgment, execution and levy.

The execution is proved by the original, or a certified copy.

In replevin, if the plaintiff count in the detinuit, he can recover damages for the detention only until replevin, though he should prove the property still in defendant's possession.

REPLEVIN for a carriage and harness. Sheriff returns "goods replevied; defendant gave security, and the property remains in his hands."

Pleas—1st. Property in James R. Truitt, and that defendant as a constable by virtue of execution process at the suit of C. S. Watson & Co., against the said James R. Truitt, took the goods and chattels in the declaration mentioned. 2d. Property in the said James R. Truitt; and a further justification as constable by virtue of execution process, at the suit of John R. Draper against the said James R. Truitt. 3d. Property in James R. Truitt.

Houston, for plaintiff, relied on the insufficiency of the proof of the levy. The proof offered and admitted was the magistrate's docket of two judgments at the suit of C. S. Watson & Co. vs. James R. Truitt; and John R. Draper vs. James R. Truitt, on which there was an entry that execution, issued to Wm. F. Revill, const., August 12th and 15th, 1842, which were returned "goods sold for \$76 61, &c." There was also a certified copy of the said judgments, to which there was added what purported to be a copy of an inventory and appraisement, including a carriage and harness. The execution was not produced nor a copy of it: nor was there any connection shown between this copy of the levy and the judgments and execution, except that it was added to the copy of the record of the judgments. (2 *Harr. Rep.* 343, *State use of Causey vs. James Lofland*.)

The Court.—The two first pleas alledge property in James Truitt, and justify the taking it from plaintiff by virtue of execution process in defendant's hands as constable at the suit of the Messrs. Watson & Co. and John R. Draper. As to the authority under the levy, the defendant has produced evidence of the judgment and entry of the issuing an execution, and also a detached copy of an inventory and appraisement; but he has not shown any execution by the production of the original writ, or any certified copy of it. It does not appear therefore by any evidence, that this execution justified the defendant in seizing these goods; and as an officer, justifying under process, must prove his authority and that the process authorizes the act, he fails in doing so unless he shows the process or a certified copy of it. The defendant fails then on the first two pleas. The third plea simply sets up property in James Truitt. It is for the jury to say on this issue, whose property was this carriage and harness at the time of the taking. If the jury is satisfied that it was James Truitt's property, the verdict should be for the defendant; if the contrary, the verdict ought to be for the plaintiff, and damages for the caption of the property and detaining it until it was replevied.

But objection has been taken to the right of recovery in this case,

because it has been proved that the defendant still detains the property; and the declaration is only in the detinuit.

In our practice the declaration in replevin depends on the return of the sheriff. If the sheriff shows that he has replevied the property and delivered it to the plaintiff in replevin, his declaration is necessarily in the detinuit; for he has got the property and complains only of the taking and detention until replevied. If however the sheriff's return shows that he has not delivered the property to the plaintiff in replevin, because the defendant gave security and kept it, the declaration is in the detinuit, and goes for damages to the value of the property taken. The declaration is here in the detinuit, and though it is proved that the party still detains the goods, the plaintiff can recover, on this declaration, no more than he seeks; damages for the taking and detention until replevied.

Verdict for the defendant.

Houston, for plaintiff.

Cullen, for defendant.



DAVID BURTON, Appellant *vs.* JOHN B. WAPLES, Administrator of DANIEL BURTON, deceased, resp't.

Objection cannot be taken by a stranger to the grant of administration on the ground that there are other persons whom the law prefers.

APPEAL from the Register's court of Sussex county, in the matter of the granting letters of administration, d. b. n., on the estate of Daniel Burton, deceased.

Record of the grant of letters to defendant. Petition by David Burton to the register to revoke the grant of letters to defendant, and grant them to petitioner. Petition dismissed. Whereupon this appeal was taken.

Causes of appeal:—1st. Because John B. Waples is not entitled to any part of the residue of the personal estate of Daniel Burton. 2d. He is not a creditor of the deceased. 3d. He is not a suitable person to be administrator, being a seafaring man, generally absent from the State. 4th. Because Daniel Burton, deceased, left to survive him four brothers, fully competent and willing to administer.

Houston.—The administrator appointed was not entitled to the administration as a person entitled to any part of the residue. The

question will then be whether his appointment was good as some other *suitable* person. (*Dig.* 219.) On this point the preference should be given to the most suitable person who is the brother, next of kin, or person entitled to the residue.

Wootton.—The act of assembly authorizes the register to *remove* an administrator only on the grounds of absence, or neglecting to discharge the duties of his office. This petition was for a removal of the administrator, and it was not founded on either of these grounds, and the register had no right to remove him.

Houston.—The whole record is up, and this is an appeal from the grant of letters originally, as well as from the decree dismissing our petition.

Wootton.—If the objection be to the grant of letters, that ought to have been made before the register at the time of granting the letters; and if no objection was made then, no appeal would lie on the question of granting the letters. The only matter to which this appeal applies, is the petition to revoke the letters and remove the administrator. It alone was litigated on that petition, and as to that the testimony ought to have been taken in writing.

Houston.—Then the appeal is of no avail; for no notice is given to parties interested on the original grant of letters.

The Court.—The record shows both decrees of the register; the one appointing John B. Waples administrator, and the other refusing to remove him, from both of which an appeal lies. The exceptions here are all to the first decision appointing the administrator, and the case may go on as to that decree.

Houston.—Neither the appellant nor respondent are entitled to administer as persons entitled to the residue or creditors. The question will then be which of these persons is most suitable, the appellant, who is a brother; or the respondent, who is a stranger, and by his occupation unfit to administer the estate.

Wootton.—The child of Daniel Burton is entitled to the residue, and the respondent's wife is its aunt. Even if Capt. Waples is not the *most* suitable person, if he is a suitable person to administer the estate, his appointment is good.

Court.—As it appears that neither the appellant nor any person complaining of the grant of these letters is in the position of a person whom the law *prefers* in the grant of letters, the only question is, whether the person to whom the register granted the letters was at the time of the grant of letters a *suitable* person, capable of administering the estate. This was a matter in the sound discretion of the

register, and there is no evidence that Capt. Waples was an unsuitable person, though from a change of circumstances since the grant of letters, it might be desirable for another person to have the administration. If the occupation of Capt. Waples causes him to neglect the duties of his office, he may be removed by the register, but we have no grounds before us to reverse the grant of letters.

Sentence of the register affirmed.

Houston, for appellant.

Wootton, for respondent.



Lessee of WILLIAM WALLACE vs. ROBERT LEWIS.

The deed of an infant conveying land for a valuable consideration, is voidable on his attaining full age; and when avoided is of no effect. Such a deed is valid until avoided; and a party in possession under it, cannot be regarded as a trespasser.

The power of avoiding such a deed, should be exercised within a reasonable time after full age; and therefore a person who sold and conveyed land for a valuable consideration a few months before he came of age, who stood by for upwards of four years and saw the purchaser improve the land, was not allowed to recover in ejectment against his own deed.

KENT, October Term, 1843. This was an action of ejectment for certain lands in Kent county.

The plaintiff showed title, as heir at law of Susan Wallace, his half sister, to one third of the land late of Train Caldwell, deceased.

The defence rested on the plaintiff's own deed to defendant, for all his interest in the land, dated August 17th, 1837; and duly acknowledged and recorded. The defendant went into possession under this deed, and improved the premises.

It now appeared, that William Wallace was not of age at the date of that deed, nor until the December following. He was acting and doing for himself previously, and at the time of conveying, declared himself to be of full age. This suit was brought more than four years after.

Smithers, to the jury.—Plaintiff's lessor is entitled to one third of the lands of which Train Caldwell died seized; that is, to all the share of Susan Wallace, his half-sister. The defence is the deed of Wm. Wallace to defendant, made on the 17th of August, 1837. When that deed was made Wm. Wallace was an infant under the age of twenty-one years. He has avoided it by bringing this suit.

Frame.—Do you mean to contend that the deed is void, or voidable only?

Smithers.—However much this question has been mooted heretofore, we consider it settled now; and shall only contend that the deed is voidable.

Wm. Wallace is proved to have been born December 25th, 1816. The deed was made, August 17th, 1837. He came of age, December 24th, 1837. The deed was therefore made by an infant, and it is competent for him to avoid it at any time after attaining majority, until he confirms it by some decisive act. It matters not that he was within a few months of full age, he was no more competent in law to make a deed than an infant of five years old. The deed of an infant is *voidable* without reference to the circumstances under which he made it. He is the sole judge whether it is for his interest to avoid it.

The question then will be whether this deed may be avoided by this action. 1. This deed may be avoided although the infant when he made it, fraudulently held himself out as of full age. The rules on this subject, all proceed on the idea of protection to the infant. (3 Com. Dig. 549, *Enfant c. 3*; 3 Jac. Law Dict. 432; 2 Kent Com. 240; 1 Johns. Ca. 127; 3 Burr. Rep. 1799, *Zouch vs. Parsons*; 11 Serg. & Rawle 310; 2 Peters' Dig. 452.)

2. When must an infant avoid a voidable deed? We shall contend, that he may avoid such deed by action at any time within the period of legal limitation, viz. twenty years. An infant is not bound at common law, to avoid a fine within twenty years, much less a feoffment or deed operating under the statute of uses. (3 Thom. Coke 6 143; 1 Ployd. 357, 360. 3 Com. Dig. 553, *Infant B. 4*; 4 Ibid 346; 3 Bac. Ab. 127, *Infancy G*; 3 Jac. Law Dict. 51.) For if a fine, which is matter of record, may be avoided by an infant at any time after his majority, much more may a feoffment, or deed of bargain and sale, which as matters in pais are of less dignity, be avoided at any time. An infant may avoid matters in pais at any time, as a deed of bargain and sale. (1 Thom. Coke 142; 3 Ibid 26; 3 Com. Dig. 556; 3 Bac. Ab. I. 2, 135; 3 Burr. Rep. 1805-8.) At the common law then we have shown, that infants were not bound to any time to avoid either fines of record, or feoffments, or any acts in pais. The statute of 31 Jac. 1, limits them to five years after disability removed to avoid a fine; and there is still no limit to the avoidance of acts in pais. Our own act of limitations gives an infant three years after full age. (Dig. 397.)

3. The only act which we have done in disaffirmance of this deed is the bringing of this suit; and we shall contend that this is sufficient. (8 *Taunt. Rep.* 35; 2 *Saund. Pl. & Ev.* 100; 17 *Maine Rep.* 38; 2 *Kent. Com.* 237, n.; 11 *Johns. Rep.* 538; 14 *Ibid.* 128; 2 *Pet. Dig. Infant, Infancy*, 452.) The mode of avoiding a deed, was originally by writ of *dum fuit infra etatem*, or writ of *assize*; both of which remedies have been superseded by the action of *ejectment*. (2 *Thom. Coke* 385.) The bringing the action of *ejectment* is of itself an avoidance of the deed. (3 *Burr.* 1797.) If the bringing an action of *ejectment*, be not an avoidance of the deed, what would avoid it? The bringing a second action could not be of more avail than the first, and if it could, the law which abhors a multiplicity of actions would give to the first action the effect of both avoiding the deed and recovering possession. The mere omission to bring suit will not validate a deed made by an infant. There must be some act of confirmation. (3 *Mauds & Selw.* 482.)

4. The right of a person to avoid a deed made during infancy, does not depend on the question whether it was for his benefit. He is the exclusive judge of this matter. (3 *Bac. Abr.* 136-7; 2 *Saund. Pl. & Ev.* 97.) The case from 2 *T. Rep.* 77, is against us, but is not law. It was slightly argued, an *obiter dictum*, and is not supported by the authorities referred to.

Frame, for the defendant.—It is the case of a person of age within four months and eight days, selling his land for its full value; declaring himself to be of full age at the time; executing and acknowledging a deed in all the formalities of the law; now, four years after he came of age, bringing an action of *ejectment* for the same land, greatly improved, and on the mere ground that he was under age when he sold; without any offer of returning the purchase money which he has in his pocket.

The consequences of a recovery would be, 1st. To make Robert Lewis lose land that he paid full value for. 2d. To lose all his improvements. 3d. To make him liable for rents and profits. 4. To lose the purchase money, which he cannot recover back, because his suit would be barred by limitation.

Here was a deed which bound Robert Lewis; which was a valid subsisting deed of William Wallace, at least until he should avoid it. What length of time shall he be allowed to avoid it in? He laid by here for four years after he came of age; saw Lewis improving the land, and never intimated in all that time that he was under age when the deed was executed.

1st. In an action brought under such circumstances as these, the plaintiff cannot recover, because the deed being only *voidable* (as was admitted) some act must be done to avoid it before action brought. The admission that the deed was only voidable, was so sparingly made, that I cite to strengthen the position, 3 *Burr. Rep.* 1794, *Zouch vs. Parsons*; 17 *Wendell Rep.* 119; 2 *Kent. Com.* 236, n. a.

2. The deed binds the adult absolutely until it is avoided; it is a subsisting deed as to the infant, subject to his election to avoid or confirm it. He cannot before disaffirmance plead *non est factum*. (2 *Strange* 939; *Chitty Con.* 37; 2 *Kent. Com.* 236.) On these premises I contend that the infant cannot bring suit, treating such deed as a nullity, without some act on his part to avoid and annul it. The action of ejectment is an action sounding in tort; it treats the defendant as a trespasser, a wrong-doer, which he is not, whilst the deed stands as a subsisting deed. And there is no case of an ejectment brought and maintained under such circumstances, without some act of disaffirmance of the deed, even by notice to the party.

Robert Lewis cannot thus be turned into a trespasser. His possession is not wrongful. He holds under a deed, valid and binding as to him; subsisting as to Wallace until he vacated it; and he cannot be treated as a trespasser. As well might a landlord bring ejectment against his tenant without any notice. The action of ejectment is a peculiar action; and lies not except against a person whose possession is wrongful. He must be, or he must by notice be made to be, a trespasser, *before* the action of ejectment can be brought against him. (*Adams Eject.* 329.) Now it may be that a writ of right, or a writ *dum fuit infra aetatem*, or an assize, may sufficiently avoid a voidable deed, and at the same time recover the premises as if the deed were a nullity; but the action of ejectment has other features than a mere trial of title, the plaintiff's lessor must have the right of entry and the right of possession, and it treats the defendant as a wrong-doer. Such an action will not lie without a previous act of the infant disaffirming the deed. (a) (7 *Wend. Rep.* 119, *Bool vs. Mix* 136.)

A fine levied by an infant to which he is a party, (the cases cited on the other side being cases in which the infant was a mere privy) must be avoided by record, as by *audita querela*, and during infancy.

(a) The writ *dum fuit infra aetatem*, seeks to avoid the deed by alledging infancy, but it seeks not to recover the possession. (7 *Wend. Rep.* 119.)

A feoffment must be avoided by entry: a deed of bargain and sale, by express disaffirmance, as by the execution of another deed. The deed of an infant, of bargain and sale, has the same force as a feoffment with livery. (*7 Wend. Rep.* 119; *Dig. Del. L.* 93.) In case of mere tenancy at will, which has now dwindled down to an express agreement to hold at the will of the other party, the lessor can maintain no action for the possession until by notice he has terminated the tenancy.

So in all cases where the party comes into possession rightfully, he cannot be turned into a trespasser without notice. (*Adams on Eject.* 117, 191, 103-4; *13 East. Rep.* 210.)

2d. The right of an infant after full age to disaffirm the deed at his election, must be exercised in some reasonable time, and does not run through the whole period of legal limitation, as applicable to the form of action. This reasonable time must be taken in reference to the rights of others, and the election must be made so as not to prejudice others further than is necessary to the enjoyment of the right. If the grantor lie by a considerable time and see improvements made, he shall be judged in law to have waived his election, and confirmed his deed. (*1 Harr. Rep.* 233, *Randell vs. Canal Co.*)

Any right may be waived; and any act legally inconsistent with the exercise of the right, will amount to a waiver. Where a party is bound to do or not to do an act, in which the rights of a third person are concerned, he is bound to do it within a reasonable time. The privilege of an infant to disaffirm his voidable contracts, is for his protection and benefit; it is a shield and not a sword, nor to be used for the destruction of others. (*3 Burr. Rep.* 1794; *1 Fonb. Eq.* 76. n. a.; *Chitty Con.* 35; *8 Taunt. Rep.* 35; *9 Vermt. Rep.* 368, 371; *3 Vermt. Rep.* 353; *6 Conn. Rep.* 494.) The contract of an infant valid in itself, will bind him; unless he by some act disaffirm it when he comes of age. (*9 Vermt. Rep.* 368-71; *3 Vermt. Rep.* 353; *6 Conn. Rep.* 494.) One year is too long for the exercise of the right of election by an infant. (*2 Term Rep.* 436.)

Huffington, in reply.—1. Was the plaintiff bound to do any act in pais, or otherwise, disaffirming this deed before he brought his action of ejectment to recover the premises? it being proved that the only title under which the defendant claims, arises under a deed executed by the plaintiff when he was an infant. But one case has been cited in support of this position, and it is against the current of authorities. The act of bringing suit to recover the possession of the premises is the most conclusive act of avoidance of the deed. An actual entry

is never necessary but to avoid a fine. (*1 Saund. Pl. & Ev.* 554; *2 Jac. Law Dic.* 387.) The deed being disaffirmed and rendered wholly inoperative by the suit brought, it cannot avail as a defence against the suit.

2. As to the point of waiver. The case of *Randel* was between persons fully competent to contract or to avoid a contract, or waive the right of election; it was not a case of infants. Mere inaction could not deprive the party of his right to disaffirm at any time short of the ten years allowed by the act of limitation. It requires some positive *act* of the infant after his full age, to confirm the deed or waive his right of annulling it.

Booth, Chief Justice, charged the jury:—1st. That the deed of an infant under twenty-one years is voidable by him on his arriving at full age, and when so avoided is of no effect. There are some acts of an infant which are absolutely void, and therefore of no effect at any time; others that are voidable, such as this deed, and these have effect until avoided.

This deed being operative at and after its execution, the defendant went into possession of the premises under it rightfully, and the plaintiff is not at liberty to treat him as a trespasser, or as one in by wrong, until by avoiding the deed he places him in this position. The action of ejectment necessarily supposes the defendant to be a trespasser, and we are of opinion that it cannot be maintained in a case like the present without a previous act on the part of the plaintiff's lessor, avoiding the deed made by him while an infant, and under which the defendant is in possession.

2. This privilege of an infant of avoiding his contracts is a protection and shield to him, and it ought to be preserved to him in its full extent so far as needed for such protection; but there is no necessity, and no justice, in extending it so far as to make it an engine of oppression and wrong to others. It ought to be used with some regard to the rights of others, and therefore the infant should exercise it within a reasonable time after full age, having regard to the circumstances of each particular case, as of the means of being fully informed of his rights, and the opportunity of availing himself of them by disaffirming contracts made in infancy. To hold that this power necessarily continues through the period of legal limitation of the action, would be to make it a dangerous weapon of offence instead of a defence. We would not attempt to lay down any general rule as to reasonable time, but we are of opinion that in the case of a deed executed by an infant who remains within the State for four years

and upwards after majority, and sees the property conveyed by his deed extensively improved, it would be unreasonable to permit him, after such time, to avoid his deed made during minority.

Verdict for defendant.

Huffington and Smithers, for plaintiff.

Frame, for defendant.



MOSES RASH vs. GEORGE PARRIS.

A constable cannot be charged under the act of 1833 for neglect of duty, without showing process regularly in his hands.

CERTIORARI to Justice Ruth.

The record showed a proceeding by summons (under the act of 1833,) against Moses Rash, a constable, "for neglecting as by law required, to make return of his proceedings on execution process against Andrew Mitchell, to show cause why an execution should not issue against him for eleven dollars and twenty cents, principal; two dollars and sixty-five cents interest, and seventy-five cents costs, being the amount of the original execution, *Parris vs. Mitchell*;" which execution was issued by Justice Coverdale, July 13, 1839; returnable 28th September next, "and delivered to Harper and Moore security."

Exceptions :—1. That the execution was never delivered to Rash as constable, but to Harper and Moore, sureties, as appears of record.

2. That the execution was issued by Justice Coverdale, and the summons by another and not the same justice of the peace.

The judgment was reversed on the first exception. 8 vol. 265.

Frame, for plaintiff in certiorari.

Bates, for defendant, p. b.

PURNELL JEFFERSON, Treasurer of the Silver Run Company, *vs.*
JOHN STEWART.

Corporation books are evidence in a suit between the company and a corporator. A member of the company is not a competent general witness for the plaintiff in such suit.

The record of a private act of assembly, takes date from the time of lodging a copy in the recorder's office to be recorded: a private act is, therefore, not void, though not actually recorded within the year, if deposited in due time.

NEWCASTLE County, November Term, 1843. This was an action on the case for non-payment of marsh taxes.

The plaintiff gave in evidence the act of incorporation of the Silver Run Company, passed in 1790, with a supplement passed February 1837, and recorded April 12, 1838. The note of the recorder endorsed, showed that the copy of this supplement was lodged in his office for record in November 1837.

Mr. Wales objected to the admissibility of the supplement in evidence, that it was not recorded within the year after its passage; and became void by this omission. (*Dig. 32.*)

Mr. Rogers argued, that the depositing the act in the recorder's office was sufficient. The parties by so placing it in the office do all in their power; and the neglect of the public officer cannot destroy the law.

Wales.—The object of this law is, that public notice shall be given of all private acts. The act takes effect *on condition* that it shall be recorded in due time. This is the only public notice of the law. If the officer, by merely making a note that a paper is deposited, can give it the effect of a record, then it may never be recorded.

The entry of the time of deposit is not evidence, as it is no official act.

Rogers.—It is required by law, (*Dig. 92.*) and this law makes the date of lodging the instrument in the office the date of the recording.

Wales.—This refers to papers recorded under that act, and cannot extend to a private act of assembly.

Rogers.—It is general in terms: any “deed or other instrument proper to be recorded.”

The Court.—The acts of 1825 and 1829, are in pari materia, in relation to the recording papers proper for record; and the latter act provides for noting the time when an instrument is placed in the

office, which is made the date of the recording. And this was necessary, because every paper cannot be recorded as soon as it is lodged in the office; and it would be a dangerous construction of the law, as well as a very narrow one, to make the party responsible for the neglect of the officer.

Record admitted.

The plaintiff now proved the books of the corporation, and their custody, and offered them in evidence. They were admitted, though objected to. He then proved his election as treasurer of the company, and the assessment of defendant's property.

A member of the corporation was called as a general witness for plaintiff, and objected to by the defendant's counsel on the ground of interest.

Rogers.—It is now the settled law, that a corporator may be a witness for the corporation, where he has no direct personal interest in the event of the suit. His interest as a member of the corporation is not a disqualifying interest. (*Ang. & Ames* 389; 1 *Phil. Ev.* 57, n.)

Wales.—The witness is interested. The suit is by the corporation against a member for taxes; any other member is interested in the recovery. He is bound for costs also.

The Court.—The books are somewhat doubtful on this question, but we think it more in accordance with the established principles of evidence, that in respect to private corporations, any interest of the witness in the event of the suit, whether derived through the corporation, or personal, independent of the corporation, is a disqualifying interest. A recovery in this suit would be beneficial to all the other members of the corporation as alleviating their own burdens by way of taxation for the purposes of the company.

The plaintiff had a verdict.

Rogers, for plaintiff.

Wales, for defendant.



LEVI KEARNS and JAMES BLACK vs. JAMES KEARNS, Ex'r. of BENJAMIN KEARNS, deceased.

A will destroyed by the heir at law admitted to probate on proof of its contents by one witness, and production of a rough draft; the proof of execution being full.

THIS was an appeal from the decree of the Register of wills for

New Castle county, admitting to probate the last will and testament of Benjamin Kearns, deceased.

The appeal was argued at the November term, 1843; by R. H. Bayard for the executor, and Wm. H. Rogers for the heirs at law.

Benjamin Kearns, of New Castle county, executed a will in due form; and, after his death, when the family were assembled for the purpose of hearing it read, one of the family, a son and legatee, seized the will and tore it up. Application was made to the register to issue a citation with a view to prove the contents of the will, and the grant of letters. The proof of the execution and contents of the will was full, there having been a rough draft found among the testator's papers.

Two points were made by the appellants:—1st. That the register had no jurisdiction or power to take such a probate. 2d. That if the contents of the will could be so proved, it must be proved as a whole by two witnesses. The entire correspondence of the rough draft with the will destroyed was proved only by one witness; the execution of the will was proved by the three attesting witnesses; and parts of the will were proved by several witnesses. Additionally, the rough draft of the will was found in the handwriting of the testator.

R. H. Bayard.—1st. As to the jurisdiction. It is necessary in reference to the disposition of decedent's estates to establish as a tribunal for the proof of the factum of the will, courts of probate, as distinguished from courts of construction.

By our constitution and law this jurisdiction is in the register's court, with an appeal to this court. The decisions of the register cannot be questioned unless before him, or on appeal. The statute requires wills to be in writing, signed in the presence of the testator and of each other, by two or more credible witnesses. On this question there is no difference between wills of land and of personality.

A will cannot be altered or revoked, or cancelled, unless by the act of the testator. If it be cancelled or destroyed by another it is no revocation. This question of cancelling, like that of competency, is involved in the question of probate, to be tried by the register. (*Swinburne*, 432.) If the cancelling be a question of probate, so is the destruction; neither one nor the other could be, only by the act and with the intent of the testator. (1 *Wms. Ex'r.* 67-8.) All such are questions of intention. (*Swinburne*, 537.)

As the will cannot be revoked without the act and intention of the testator, if it be destroyed without that act or consent, it still exists

as his will. The will rests not in the paper but in the intent. (1 *Wms. Ex'r.* 58; *Swinb.* 538.) In case of part cancellation without intent, the will is good for what remains. When the testament is lost, so much as can be proved by witnesses is good. And this is reasonable. Having once proved the existence of a will, no destruction of the paper can defeat it whilst its contents can be proved. The will is not in the instrument; that is but the evidence of the will. Certain formalities are necessary to the existence of the instrument; these once proved, the will exists and may be proved as long as the contents of the paper can be proved. (*Swinb.* 58.) The contents of a will may be proved though the instrument cannot be produced. (1 *Wms. Ex'r.* 209; *Swinb.* 450; 1 *Hagg. Rep.* 462, *Martin vs. Layton*; 1 *Addams* 462, *Foster vs. Foster*; *Phillmore* 149, *Trevelyn vs. Trevelyn*.) A destroyed will then can be proved by parol, whether of land or personality, both of which stand on the same footing here. Not so in England in reference to wills of real estate, which can only be proved in chancery. The will is regarded as in the nature of a conveyance to the devisee; and, in a controversy respecting the land, the *will must be produced* in evidence. (1 *Wms. Ex'r.* 6, 215.) There is no such thing in England as a *probate* of wills of land. If it be a mixed will it must be proved to affect the personality, but the probate has no effect as to the real estate. Here the probate of a will has the same effect in relation to the real, as to the personal estate; and the authorities cited above as to probates in England of destroyed wills of personal property, apply here to wills of both kinds.

2d. What evidence is necessary? The rule that two witnesses are necessary, as stated in one of the cases read, is the rule of the civil law, and not of the common law. (1 *Wms. Ex'r.* 47, 196.) The civil law was a part of the law for the government of the ecclesiastical courts, and never was introduced into this country. By the common law one witness was always enough to prove the contents of a lost paper. (1 *Phil. Ev.* 107, 346, 348.) The deed or will having been proved to have been executed in due form and by the necessary number of witnesses, its contents may be proved as any other fact by the common law—by a single witness. (1 *Phil. Ev.* 348, 378.)

Wm. H. Rogers, for appellants.—The register decreed that “the provisions contained in the paper marked A., with the addition of a bequest to Elizabeth Kearns of the choice of a bed and bedstead, with a sufficiency of clothing for one bed, &c.” are substantially the contents of the last will and testament of Benjamin Kearns, dec'd.,

which said last will and testament was in writing, and signed by the said Benjamin in the presence of three witnesses, and was attested and subscribed by the said witnesses in his presence. This was proved by a single witness.

Two questions arise in the case :—1st. As to the jurisdiction of the register to take probate of such a paper. 2d. Can the will be proved by a single witness?

I agree with the counsel for respondents, that no portion of the spiritual or ecclesiastical law ever was imported into this country from England. He took much pains to prove this, and I am willing to concede it. Yet how does he afterwards refer to the modes of proceeding and decisions of the ecclesiastical courts in support of his positions?

If the power of the register to take such probate as this exists, how is it to be derived? He has no power except under the act of assembly of this State. The constitution provides for the officer, the jurisdiction; the act of assembly limits its exercise.

It has been admitted that in England the remedy in such a case as this would be in chancery. It is the same here and no other. There is abundant power in that court to establish this destroyed will, whether destroyed by accident or fraud. It was a great wrong, and unfortunately cannot be criminally punished; yet the party injured is not without remedy, but his remedy is in chancery and there only.

The only authority to the register to take probate of wills is given by the act of 1829, and it contemplates the production of the will to be filed and recorded. (*Dig. 217.*) If we depart from this act, we must adopt in the whole, or part, the powers and practice of the ecclesiastical courts; against which the full force of the argument of Mr. Bayard was levelled. But if we adopt any such jurisdiction, it is an invariable rule that with the jurisdiction, we adopt the rules of practice, the leading and prominent one being, that the will cannot be pronounced for unless proved by *two* witnesses.

2d. The proof of every will by two witnesses, is required by the express terms of our statute. (*Dig. 556, sec. 3.*)

I agree that this has reference to the authentication of the paper, which is not the will, but the evidence of the will. But the law regards the ascertainment of the will, strictly speaking, of the party, as so important, and so liable to misrepresentation, that it surrounds it with certain formalities, essential to the establishment of the will. Without these formalities, the intention, residing in the breast of the

testator, can never be pronounced his will, unless it be reduced to writing, and attested by two witnesses, who are to prove it. The witnesses attest not merely the paper which is evidence of the will, but the will itself.

If the decree of the register in this case be affirmed, it establishes the paper appended to the record, as the will of the testator, with an addition that is not on the paper. Yet this paper is not attested by two witnesses, or by any witnesses; it was never executed, and it avowedly does not contain the whole will.

The Court took time to consider of it: and, in vacation, ordered judgment to be entered affirming the decree of the Register.

Rogers, for appellants.

Bayard, for appellees.



MATTHEW MACKLIN, et al., Road Commissioners of W. C. Creek
Hundred, vs. JOHN RUTH, et al.

Judgment by default, in an action on a bond with a collateral condition, admits a cause of action; and the execution need not be proved on inquiry of the damages.

THIS was an action against the defendant John Ruth and the others, his sureties, as collector of road taxes for W. C. Creek hundred, New Castle County.

The declaration was on a lost bond; and the defendant suffered judgment to go by default, and an order was made in the nature of a writ of inquiry to charge the jury attending at this term, to inquire of the damages, &c.

The jury were sworn "well and truly to inquire, and true inquisition make and return, of the damages and costs sustained by the plaintiff on occasion of the breaches of the condition of the writing obligatory assigned in the declaration in this cause," &c.

Mr. Rogers opened to the jury, and stated that as a judgment had been rendered by default, he should proceed to show the damages without any proof of the bond, or of its loss; as the judgment by default admits the cause of action.

Mr. Gray, who now appeared for the defendant, insisted that the plaintiff was bound to produce the bond, or prove its loss. (*2 Saund. Pl. & Ev. 90; 3 Term Rep. 301.*)

The Court thought there was no analogy between this case and the one cited of an action on a promissory note, which is of itself evidence of the debt, and therefore, its production necessary. But this is an action on a bond with a collateral condition ; which, if produced, would have no effect in proving or disproving the matter now to be tried, which is the amount of damages occasioned by breach of the condition of the bond. This breach must be proved independently of the bond ; the existence of which is admitted by the judgment by default, which admits a cause of action ; to what amount must be the subject of proof.

The jury made and returned an inquisition in the case, assessing the damages and costs at \$529 61.

Rogers, for plaintiffs.

Gray, for defendants.



WILLIAM WILSON vs. JOHN P. COCHRAN, et al., Levy Court Commissioners of N. C. County.

The return and confirmation of a public road settles the question of damages, and the party entitled to receive the same, only so far as to authorize payment to such party.

' RULE on the Levy Court Commissioners of New Castle county, to show cause why a mandamus should not issue, to compel them to pay plaintiff out of the county treasury the eight-ninths of two hundred and thirty-five dollars, being damages assessed on the opening of a certain road laid out and opened in New Castle county. (See *Wilson vs. Hollingsworth's adm'rs. 3 Harr. Rep. 500.*)

The affidavit of William S. Wilson stated :—That previous to Nov. 1, 1838, a road was laid out in Brandywine hundred by virtue of an order of court, &c., which road passed through the farm of Amer Hollingsworth, and the freeholders assessed the damages to said Hollingsworth at two hundred and thirty-five dollars. The return was confirmed at May term, 1839. The Levy Court approved of said road and ordered it to be opened, and it was opened ; and the Levy Court ordered the damages to be paid to the parties entitled. This was in the year 1841. Amer Hollingsworth died intestate in Nov. 1838. Upon the application of his heirs at law, the

Orphans' Court divided said farm into two parts, of which one was accepted by Joel Hollingsworth, and the other ordered to be sold, and it was sold, and bought by the relator, on the 14th of January, 1841; and it was duly assigned to him by the Orphans' Court, on the 17th of February, 1841. The road so laid out passes for eight-ninths of the distance on the part so sold to relator, who claims that proportion of the damages. The clerk of the peace on the 25th of January, 1842, paid Amer Hollingsworth's administrator the said sum of two hundred and thirty-five dollars. The relator presented his claim for these damages to the Levy Court on the 15th of February, 1843; and the Levy Court, on the 13th of March 1843, refused to allow or pay the same.

Mr. Gray, for the Levy Court, now showed cause.—The Levy Court had no power to order these damages to be paid to any other than the person to whom they were assessed by the freeholders appointed by the Court of General Sessions. They have paid these damages to such person before any claim by the relator. The freeholders are to assess damages to “the owners or holders of the land.” This return was *confirmed* by the court; and the effect of such confirmation is to “settle” the damages; that is, the amount and the person to whom they are payable. (*Dig. 468, sec. 5; Ibid 470.*)

In case of change of rights, or claim to damages by other persons not named in the return, the Levy Court is not the tribunal to change the record; but the Court of General Sessions should be moved to annul the return of the freeholders. Neither has the Levy Court power to try these questions of disputed claim to damages, or to divide the damages amongst claimants. There can be no security to the county, unless the Levy Court is protected by a payment of the money to the person to whom the damages are assessed by the freeholders in their return, made to, and confirmed by, the court. In conformity to this view, the Levy Court has paid the money to the administrator of Amer Hollingsworth. If this money was improperly paid to the administrator of Hollingsworth, and this relator is entitled to any part of the damages, he can recover in an action against him.

Chandler, Rodney and Wales.—The question of the right to these damages, was fully argued in the case of Wilson vs. Hollingsworth's administrator; in which case, the court intimated a decided opinion that this relator was entitled to the damages, or a portion of them. After the intimation of that opinion, it seemed to us that the proper mode was by application to the Levy Court for payment; and on

their refusal to pay, by application to this court for a mandamus to compel them to pay. If the right to these damages was in the relator, the payment of them to any other person would not discharge the liability of the county to pay to the person properly entitled.

How could we go into the Court of General Sessions, years after this return was made and confirmed, and get that court to change the record? What propriety would there be in changing the record? It is all right. At the time it was confirmed, the damages were due to Amer Hollingsworth. If the Levy Court have paid the money to the representative of Amer Hollingsworth under a mistake of facts, not knowing of the assignment and sale of the land, they can recover it back; if through a mistake of the law, they must take the consequences. That they had no right to pay the money to the administrator of Amer Hollingsworth, has already been decided.

On the remedy by mandamus.—This is a remedy for an ascertained legal right where there is no specific remedy. (1 *Cranch Rep.* 147, 172, *Marbury vs. Madison*; 3 *Blac. Com.* 53, 109; 7 *Cowen Rep.* 526; 10 *Wend. Rep.* 363; 12 *Johns. Rep.* 414; 18 *Ibid* 242.)

At the time the damages in this case became payable, the relator was the owner of the land on which this road was opened, or eight-ninths of it. Amer Hollingsworth in his lifetime, or his administrator after his death, had no right of action to recover it. Where is his remedy? The Court of General Sessions has nothing further to do with it; their jurisdiction and power, as well as that of the freeholders, is fully discharged. There is then a clear undoubted right in the relator, to receive from the county of New Castle, eight-ninths of these road damages; how is he to enforce his right? He cannot sue the county, and he is without remedy except by mandamus. (*Bac. Abr. tit. mandamus.*) The right to the damages being established by the relator, and it being shown that the Levy Court is the only tribunal that can authorize the payment out of the funds of the county, it is competent to this court to compel such payment by mandamus.

The damages were paid by the county to the administrator of Hollingsworth as administrator. He never received the money, or any part of it, for the use of the relator, and he is not bound to pay it to him either individually, or as administrator. But whether there be a remedy against him or not, this does not vary the obligation of the Levy Court to pay the money to relator.

Mr. Gray.—The case has been argued on the other side, as if the relator's right to the damages was admitted. This is not so, we

deny his right to any part of it. The damages were assessed, and the road laid out, in the life-time of Amer Hollingsworth. The return of the freeholders ascertained a sum due him as damages. He died, and his administrator became entitled to such damages, as to a judgment recovered in an action of trespass, at the suit of the intestate. After his death, the relator became the owner of the land, by purchase under the Orphans' Court; and thereby took "all the estate, title and claim, which the intestate at the time of his death had in the land;" but this gave him no claim to these damages. (*Dig. 324.*) The return of the freeholders, and confirmation, settles the damages, and ascertains the party to whom payable; and the Levy Court have no power to pay to any other person. The Levy Court is not to pay to the party entitled, as has been argued; but the provision is, that the costs and damages "settled on occasion of such road, shall be allowed by the Levy Court and Court of Appeal of the county wherein the road is; and shall be a charge on said county." (*Dig. 471.*) The return of the freeholders, when confirmed, is conclusive as to the party entitled to the damages. It not unfrequently happens that the return is set aside or amended in the Court of General Sessions, on the ground that it does not ascertain the damages to the right person. So an assessment of damages to the heirs of a person, without naming them, has been held insufficient, and set aside. That court alone has the power to decide properly between these parties claimant. It would be very impolitic to open the judgment of the General Sessions as to this matter, and give the Levy Court the power; much less make it the duty of that body, to try questions of right to these damages; or to divide them among the claimants in any other manner than is ascertained by the return.

On what principle can these damages be apportioned by the Levy Court? They were assessed as a whole to Amer Hollingsworth, and by his death they were payable to his administrator. The Levy Court has no power, nor are they competent, to decide that the administrator is not entitled to them; much less to divide and apportion them among heirs and purchasers. Yet this court is now asked to compel the Levy Court, not only to pass by the right of the administrator, but to pay eight-ninths of the damages to the relator, on an apportionment made by the relator himself.

The Court.—We refuse the mandamus. Conceding that the relator is entitled to a share of these damages, we think he is not entitled to this remedy; if indeed he has any remedy against the Levy Court. The return of the freeholders, and confirmation of the same,

settles this question, at least so far as to authorize the Levy Court to pay the money to the person ascertained by that return to be entitled to it. If any one else has a claim to them, he must controvert it with the person to whom the damages are assessed. The Levy Court ought not to be subjected to the responsibility of trying such claim, or paying at their peril, after one court has by its judgment apparently ascertained to whom the damages are to be paid. The Levy Court has no power of trying this question, much less of apportioning the damages amongst persons claiming derivative interests, subsequent to the confirmation. The relator in this case, claims eight-ninths of the damages assessed to Amer Hollingsworth, because he has bought a part of Amer Hollingsworth's land, and the road runs for eight-ninths of the distance, through the part bought by him. But it by no means follows that he will sustain eight-ninths of the damage.

If William F. Wilson has a right to any part of these damages, he must seek his remedy against the person to whom, under the judgment of confirmation of the road return, they have been paid. We express no opinion as to this right of action, though we did throw out an opinion at the request of both parties, in a former trial as to this matter. That opinion was expressed extra-judicially and without much consideration; and the chief justice now entertains strong doubts whether the impression then given out, was correct. We leave this matter, however, for further consideration if necessary.

Mandamus refused.

Chandler, Rodney and Wales, for plaintiff.
Gray, for Levy Court.



JOHN MOUSELY, def't. b. vs. REUBEN J. ALLMOND, plff. b.

There may be a *second* adjournment of a cause before a justice of the peace, without application from either party, but the record should show the cause for such adjournment.

The oath against a defendant's freehold must be made within two days after judgment rendered, to deprive him of a stay of execution.

CERTIORARI.

Record. "Summons issued July 1st, 1843, returnable July 8th;

parties appeared and plaintiff appealed to referees, who were appointed and summoned for Saturday, July 22d, when the parties and referees appeared and went to trial, and the referees asked an adjournment, being unable to proceed in consequence of the bad conduct of defendant. Adjourned to Friday, the 28th, when the referees and parties appeared and proceeded with the trial. Report and judgment for plaintiff for \$32. August 19th, 1843: plaintiff makes oath against defendant's freehold, and fear of loss according to law; whereupon, execution issued."

The exceptions were—1st. That the *second* adjournment was illegal, being made without oath or affirmation of either party that he was not prepared for trial. (*Dig. 332, sec. 4.*) 2d. That the execution was illegal, being issued against a freeholder on an oath against his freehold, made more than two days after judgment. (*Dig. 338, sec. 13.*)

By the Court.—The second adjournment in this case was made by the justice, not on the application of either party, but on his own motion at the suggestion of the referees, who considered it necessary for a fair trial of the cause. It was made also under circumstances of interruption, and misconduct on the part of the defendant, which would operate beneficially to him if he should now be permitted to take advantage of his own wrong by objecting to the adjournment, which his misconduct occasioned. But apart from this, the first clause of the 4th section gives power to the justice to adjourn the case from day to day, as shall be necessary for a fair trial; and where the record shows this, we apprehend the proceeding is legal, though the second adjournment should not be granted on the application or oath of either party.

2. The second exception raises a new question as to the time within which oath must be made against the defendant's freehold, so as to deprive him of the legal stay of execution. The provision is, that in case of a judgment for more than \$5 33 against a freeholder of the county, there shall be a stay of six months, unless he shall waive his privilege, or unless the plaintiff or some one for him, shall make oath or affirmation that he has good ground to believe, and does verily believe, that if the stay of execution for six months be allowed, the sum due by the judgment will be lost; and if a freeholder, in relation to whom oath shall be made as aforesaid, shall, within two days after the day of giving such judgment, give sufficient security to pay the judgment, there shall be a stay of execution for nine months. The question is, whether under this section an oath

against the freehold may be made after two days from the rendition of judgment.

The question in relation to the stay of execution necessarily arises at the time of giving judgment. If the defendant be a freeholder he has a right to the stay unless oath be made, and this is a matter for immediate decision; for provision is made in the latter part of this section for issuing execution even within the two days, to be superseded by security afterwards given. It is for the justice to decide on rendering judgment, whether the defendant is entitled to a stay; and that decision must be made within such time as shall not be prejudicial to the other party. But the act of assembly allows the defendant two days after the date of the judgment to give security, and avoid the effect of the oath against his freehold, of which he would be deprived if such oath could be made *after* the expiration of the two days. The plaintiff is therefore restricted by the necessary construction of the act, taking both clauses together, to two days from the date of the judgment, if he would make oath against the defendant's freehold, and deprive him of the legal stay.

Judgment affirmed. Execution set aside.

Rogers, jr., for plaintiff.

Whitely, for defendant.



BENJAMIN TOWNSEND, defendant b. app'l. *vs.* JOHN STEWARD
plaintiff b. resp't

The transcript filed before a justice of the peace in an action of trespass, is not evidence on an appeal. It is filed as the initiative of proceedings in the appellate court, where the cause proceeds on the pleadings *there* had.

If the declaration in such appeal do not correspond with the statement, this cannot be objected to after pleading to issue.

But the transcript must show the jurisdiction below, and the right of appeal. The want of this may be objected to at any time.

This was an appeal from the judgment of a justice of the peace. The declaration was in trespass for killing the plaintiff's ox.

The plaintiff proposed to prove, that Townsend took the ox and appropriated him to his own use. This was objected to, because there was no count de bonis asportatis.

Wales.—The statement filed before the justice, complained not merely of killing the steer, but of the appropriating it to defendant's

own use. The statement before the justice, is a part of the proceeding to which we may look, and must look; for this being an appellate court, the proceedings here *must* be the same as in the court below. (*1 Binn. Rep.* 219; *3 Ib.* 45.)

W. H. Rogers.—The statement before the justice is no part of the record here. The transcript must be filed to give this court jurisdiction of the case; but that being done, the case proceeds here as if begun *de novo*, by declaration plea, and issue.

By the Court.—The transcript of the justice is filed in this court to give it cognizance of a case, of which it has appellate jurisdiction. The proceedings here, commence by declaration, and proceed as in other cases. For the cause of action, we look only to the plaintiff's declaration. We can try no other issues than such as are joined upon the allegations in that declaration. If the plaintiff has omitted from his declaration, any matter contained in his own statement of the injury before the justice, it is his own voluntary waiver of that part of his claim. The defendant has no opportunity to plead to such matter, and the jury are not sworn to try it.

It has often been decided that the proceedings below were no evidence on the appeal, and that it was improper even to allude to them, further than to state that the cause came up on appeal. If the proceeding on appeal does not correspond, as to the nature of the claim, or cause of action, with the proceedings below, as shown by the transcript, objection might be taken to this by motion to dismiss the appeal, or other appropriate form of remedy; but not after pleading to issue upon the claim as presented in this court. Much less can the plaintiff object to his own declaration, that it is not in conformity with his complaint below. It has been decided in this court, that where the court has jurisdiction of the subject and of the parties, any objection to the jurisdiction founded on the mode in which the suit is brought into court, must be made at the earliest stage; or it will be considered as waived. In the present case, if the omission of the plaintiff to state in his declaration a part of the complaint which he made below, be any objection to the regularity of the proceedings, it is certainly not one that he can take advantage of at any time; much less after issue joined on other matters which are within the jurisdiction both of the justice, and of this court.

The statement of the cause of action filed before the justice, cannot be read on this trial, either as evidence, or as presenting any ground for the admission of evidence. There is no issue in the

cause on a complaint of taking and carrying away this ox or steer, and no evidence of it is admissible.

Evidence ruled out. Defendant had a verdict.

Wales, for plaintiff.

W. H. Rogers, for defendant.



GEORGE F. JACKSON, def't^t. b. *vs.* JOHN HEDGES, plff. b.

In an action of assumpsit commenced before a justice of the peace against two persons jointly, but where only one was taken and judgment recovered against him alone, the court on appeal, sustained a declaration and verdict against him, without noticing the person originally named as a co-defendant.

APPEAL from the judgment of a justice of the peace in an action of assumpsit. Narr. Pleas. Trial and verdict for plaintiff below. Motion in arrest of judgment.

The case came into this court on an appeal from the judgment of Justice M'Caulley. The action below was by John Hedges against George F. Jackson, and John S. Dickenson. The constable returned "non est" as to John S. Dickenson. Jackson appeared and went to trial, and there was judgment against him for \$21. On the appeal the declaration was against Jackson alone; and for this error Mr. Wales moved to arrest the judgment.

Wales.—The appellate court acts only on the case as it was below between the same parties, and for the same cause of action. No new cause of action can be presented; no new parties can be added and no parties omitted; otherwise, it is not the same case on appeal as on the original trial. This would give the appellate court original jurisdiction. (*1 Binn. Rep.* 219, *Moore vs. Wait*; *3 Ibid* 45, *Owen vs. Shelhamer*.) The cause of action, as it existed at the commencement of the suit before the magistrate, cannot be varied afterwards. Here the cause of action was a joint claim against Jackson and Dickenson; and the claim presented in this court is against Jackson alone.

Whately.—The action below was docketted *Hedges vs. Jackson* though the summons was against Jackson and Dickenson, Dickenson not being summoned. The judgment was against Jackson alone, and the appeal was taken by the defendant, Jackson himself, in a case of *Hedges vs. Jackson*. But if this be really an objection to the

form of action here, it must be objected to before pleading to issue, and the defendant cannot now object that there is another party who ought to have been sued. (1 Chitt. *Plead.* 29; 1 Saund. *Rep.* 154, *a. n. a.* 291, *a.*) On appeal the proceeding here has no reference to the pleading below; the transcript is no part of the case here, and it is wrong even to refer to the judgment below. The case stands here quasi a new suit. "The case shall be proceeded in by the same pleadings, and in the same manner as on an original case commenced in this court." So says the act of assembly. (*Dig.* 144.) Yet, in a case so originally commenced here, this objection of non joinder of a party defendant, could not be made after issue joined.

Wales, in reply.—The transcript is a necessary part of the proceedings on appeal; it must be filed in the cause. The case cannot exist here without it. It is necessary to give this court jurisdiction. It must follow the record below, and must be followed in the pleadings here. (*Dig.* 343.) Neither is this a question of pleading. Being an appeal, if the defect appear on any part of the record, it will be fatal without plea. So decided in the cases cited from Binney. The rule as cited from Chitty and Saunders, applies to cases where the non joinder of parties does not appear by the record; there the defendant must plead it in due time; but if it appear by the record, it need not be pleaded.

By the Court.—The judgment rendered by Justice M'Caulley, was a judgment against George F. Jackson alone. He could render no other judgment; for though the summons embraced another defendant he was not taken, could not have been declared against, and any judgment against him, even in connection with Jackson, would have been erroneous. He appealed from that judgment, and brought the case into this court. How was the plaintiff to declare here? If he had declared against Dickenson, as well as Jackson, it would have been error; for Dickenson is no party to the judgment below, or in the proceedings here. It would have been fatal even on demurrer, or in arrest of judgment; for the record would have shown proceedings and verdict against a party who was never in court. Again, if the plaintiff could have declared against Dickenson here, and obtained a judgment against him, it would have been an original judgment as against him; and not a judgment on appeal. There was no course but to declare against the party who was in court by the appeal; against whom judgment had been rendered in the court below, and that party is Jackson.

It is stated in the case cited from 1 Binney's Reports, that the
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transcript which accompanies the appeal, is in place of a writ; and the foundation of all the proceedings in this court: and our act of assembly directs that the proceedings here upon such appeal, shall be proceeded in by declaration, pleadings and trial, in the same way as in cases originally commenced in this court. Now if the transcript stands for the writ, and shows but one defendant taken, the declaration must be, as it would be in any other case showing the same state of facts namely, against the party taken, who is in fact the party against whom judgment below was rendered. If then the appeal must follow the judgment, or the pleading here must be conducted as if the case was originally commenced here, George F. Jackson was the only defendant, either in this court or the court below, against whom a declaration could have been filed, or a judgment obtained.

Judge Layton, dissented.

LAYTON, *Justice* :—The difficulty I have in this case exists, probably, more in the nature of a *doubt*, than of a well settled opinion as to the merits of the motion. But so far as I have been able to examine this case, I am unable to agree with my brethren in opinion.

The proceedings before the justice of the peace by Hedges, were against two, Jackson and Dickenson. There was a return of "non est" as to Dickenson; and after hearing, judgment was rendered against Jackson alone. It is true the appeal was by Jackson alone, but the transcript sent up by the magistrate, shows this to have been a joint demand upon, and a joint indebtedness by Jackson and Dickenson. The transcript from the justice, is made a part of the proceedings in this court. It gives *color* to, though it is not the *foundation* of the proceedings here. The demand itself, the indebtedness of the defendants, whether by bond, note, or book account, is the foundation of the plaintiff's declaration. It occurs to me, that the summons should have been against both Jackson and Dickenson, as in other cases of original proceedings in this court, against joint debtors, and a return of "non est" against one, would have justified the declaration and judgment against the other. But the plaintiff here files his declaration against Jackson, yet exhibits both in the transcript from the justice, and also by his books of account, a joint demand against Jackson and Dickenson. There is a variance between the plaintiff's declaration, and the proof he adduces in this court to sustain his declaration. What is there in this declaration against Jackson alone, to connect the demand and declaration against him, with the demand against Jackson and Dick-

enson? None that I can see. The plaintiff himself, in the record, as by his proof, has disclosed the fact of his having a joint demand against two, when he has declared against only one. It strikes me, that it is an objection which the defendant may take advantage of, on a motion in arrest of judgment: and such, I take to be the law as I can gather it from the authorities. In support of this view of the subject, I refer to 1 *Saund. Rep.* 291, b. [note;] 3 *Binn. Rep.* 45, *Owen vs. Shellhamer*; 1 *Binn. Rep.* 319, *Moore vs Wait*.

Judgment for plaintiff.

Wales, for plaintiff,
Whately, for defendant.



CARNAHAN, THOMPSON and RICE vs. ALLDERDICE, JEANDELL
and MILES.

Judgment against an infant and others jointly, on a joint and several bond, irregular.

RULE. In this case the court, on motion and rule to show cause, vacated a judgment confessed against the three defendants jointly, on a joint and several warrant of attorney; on proof that two of them were under age at the date of the warrant.

Rule absolute.

SUPERIOR COURT.

SPRING SESSIONS,

1844.

POLLY BURTON, widow of James, *vs.* DAVID HAZZARD, of Joseph.

The judgment in a former suit, is not evidence, unless between parties or privies; even where the issue in the former cause, was on a claim of property by the new party in the second suit.

REPLEVIN. Goods replevied and delivered to plaintiff. Narr. Plea, property in defendant.

The property in question was seized and sold, on execution process against plaintiff's son, John H. Burton, as his property, and bought by defendant. The plaintiff claimed the property at the sale. She and her son lived together. (See the former case of Hazzard *vs.* Burton, ante. p. 62.)

The defendant proved the judgment, execution, levy and sale of the goods as the property of John H. Burton, and his purchase; and produced evidence that John H. Burton carried on the farm, on his own account; bought and sold the property, and was the real owner. Evidence was offered on the contrary for the plaintiff, in support of her claim to the property; amongst which, was the record of the trial and judgment, in the case of David Hazzard and John H. Burton (ante p. 62,) for this same property, which suit was defended by the present plaintiff, and in her behalf.

Ridgely, for defendant objected, because the cases are between different parties, and for different matters.

This record is offered as an estoppel, and the rule is well settled that every estoppel must be pleaded. There is no estoppel by former recovery, unless between the same parties or privies. These are neither. The former action was David Hazzard *vs.* John H. Burton; this is Polly Burton *vs.* David Hazzard, and this not by force of any privity of title between Polly Burton and John H. Burton; for the allegation of the plaintiff is, that John H. Burton has no right to the property. The former suit is not even evidence in this case. Suppose both suits were for the same matter. Because a certain

issue was tried between David Hazzard and John H. Burton, shall he be forever precluded from litigating the same question with any other person? Why in the former case, Polly Burton was a competent witness, and the case may have been decided on her evidence. In this case John H. Burton has been examined, yet he was not a competent witness in the other case; shall then one case conclude the other. (*1 Saund. Pl. & Ev.* 38; *Ibid* 50; *Roscoe Ev.* 99, 6, &c.)

By the Court :—The verdict and judgment in the former case, are not evidence here; 1st. Because the parties are not the same, nor are they privies. Polly Burton was not a party to the former suit, and she has no privity here with John H. Burton. 2d. The verdict for the defendant in the former case, was on a plea of non ceptit as well as on a plea of property in Polly Burton. How then can any one say, the verdict there concludes this question of property in Polly Burton. 3d. Even if the verdict in the other suit was on the plea of property in Polly Burton, it was rendered on proof of her declarations, and might have been, on her testimony. Shall then the plaintiff be precluded, on an action against him for the same property, from denying that this is Polly Burton's property. Suppose the verdict in that case, had been *for* D. Hazzard, would it have been evidence in this case *against* Polly Burton? Certainly not. Shall it then be evidence *for* her. The rule is, that the benefits of a verdict must be mutual, to make a party liable to its consequences. •

Record ruled out.

Cullen, for plaintiff.

Ridgely, for defendant.



WM. H. ROSS et al., appellants *vs.* WM. L. HEARN et al. respondents.

HEARN et al., appellants *vs.* ROSS et al., respondents.

Where the heir at law contests a will on reasonable grounds, the costs fall on the estate.

So the proper costs of an executor for defending the will, shall be allowed him.

THESE were cross appeals from the decree of the Register of wills for Sussex county.

On a review of the will of Caleb Ross and an issue of "devisavit

"vel non" tried and found for the will, the register charged all the costs of the issue on the estate, though there was no good ground for impeaching the will; and allowed the executor only \$300, for fees paid counsel for defending the will, though he had paid \$900.

Both sides appealed from this decree.

Cullen and Ridgely, for the executor.—The personal estate was about \$65,000, and the real estate much larger than this. The executor was bound to defend the will, though such defence was against his own interest; and he paid for this \$900, which was the fee to three counsel; \$300 for each. The defence was successful; yet, the register refused to allow the executor any more than \$300.

We complain also, that the register charged all the costs of the trial on the estate, though the objections to the will were so frivolous, that the jury rendered a verdict without leaving the bar.

In the case of Chandler's will (N. C. C.) though the will was set aside, the court allowed the executor all his expenses, including counsel fees in defending the will. The petition for a review never discloses the ground of objection to the will. Hence the counsel for defence have to prepare themselves on all possible grounds. (2 *Ecc. Rep.* 95, 424, a party questions a will at the peril of costs; 3 *Ibid* 147; 4 *Ibid* 197.)

Houston, contra.—We object to the allowance by the register of even the \$300 to counsel. There is no ground for the allegation that Wm. Ross, the executor, had no interest to defend the will. He defended the suit because he got the best share under the will. The objections taken to this will were not frivolous. They were sincere, and in our judgment at the time sufficient. Chandler's case was well calculated to give us that impression. The distinction made by the court between that case and this, though substantial, was refined. It is enough for us to say, that we in good faith counselled the reviewers that the objections existing against this will would be fatal to it; and in a full argument running through two days, we tried to sustain this opinion. The review need not have put the counsel for the executor to a preparation on the whole law. The ground was well understood.

It is a dangerous precedent to allow an executor to expend what he pleases out of the estate in defence of a will. And this, when he was acting not merely as executor, but as the devisee chiefly interested. The principle of the ecclesiastical courts that a cavarator questions the will at his peril of costs, is not a principle of the law of

Delaware. The universal practice here has been to charge the costs on the estate, and then all the parties interested pay their share. Having sufficient apparent ground to question this will, we ought to be allowed costs. We pay our own counsel. We concede that the other side shall have their costs, but we ought not to contribute to pay their counsel for defeating us. If their counsel fees shall be charged on the estate, why should not ours? The court has never gone so far as to decide that where the executor defends not merely as executor, but as devisee and party most interested, that he shall have not only costs, but his counsel paid out of the estate.

Bates, in reply.—1st. Is William Ross, the executor, to be allowed the reasonable fees paid counsel for defending the will of his father against the fruitless attack of those who now object to the allowance of these fees?

The principle is no new one that a trustee shall be allowed his reasonable expenses in defending the trust. What is this case? The richest man in Sussex dies leaving a splendid fortune among his children, in a most reasonable mode, securing to the daughters a portion of their fortune beyond the danger of accident or misfortune of their husbands. The husbands, not liking this, cast about and find what they deem a small flaw in the will, and set about breaking it down. Was the executor bound to defend the will, or was he not? And if he was bound, must he not have the means of employing counsel? The decisions have established this as the law. (2 *Harr. Rep.* 125, *Davis vs. Walker's adm'r.*; 2 *Ibid* 375, *Duffield vs. Morris' ex'r.*; 1 *Ibid* 454, *Chandler et al. vs. Ferris*; 3 *Ibid* 217, *Bayard vs. McLane*.)

Is this allowance unreasonable? The estate \$150,000. The testator gave each son in law \$16,000, and tied up an equal fund for their wives. The sons in law on a frivolous reason, sought to set aside the whole will; so frivolous that we, not believing this to be the true ground of the objection, were compelled to look into the whole range of the law of wills. Who pays? Caleb Ross made a will which he meant should be his will, and he left ample funds to defend it. Should not the estate defend the will? If not, who will? Establish, as it has been established, that the estate shall pay the costs of impeaching the will, and that the executor shall not have the means, out of the estate, to defend it, and what becomes of wills? Wm. Ross defended solely as executor. His interest in the estate would have been no less; nay, it would have been more, if the will

had been set aside. He then defended the will as a trustee defending the trust, and the fund ought to pay for the defence.

But who ought to pay the costs of the reviewers? That depends on the reasonableness of their course in contesting the will. They had nothing to complain against the equity of the provisions of the will. The legal ground of objection to it was frivolous. In the case of William Masten's estate, the court disallowed the costs of the review.

By the Court.

Booth, Chief Justice.—The contest in reference to this will was so general on the issue of devisavit vel non, that the case had to be prepared on every ground. It was defended by three counsel, who were paid by the executor three hundred dollars each for this defence. We do not consider this an unreasonable fee, considering the magnitude of the contest, and the necessary preparation for, and labor in the defence.

Where the heir at law contests a will on reasonable grounds, he ought not to be charged with the costs, though he fail. A trustee is bound to defend his trust, and ought to be allowed all the reasonable charges, as well as costs, in making such defence. The executor was bound to defend this will as executor. Whether interested or not as devisee, he had a plain duty as executor, and he must be allowed the means of making that defence effectual. The only question then is, whether the fees paid by the executor in this case are reasonable. This can only be judged of by reference to the case in hand—the questions raised by the pleadings, or which will admit of being raised, and the usual compensation for professional services. By these tests we consider the compensation paid in this case reasonable.

The decree of the register is, therefore, corrected as to the fee paid counsel. Decree affirmed as to the reviewer's costs. We did not think the review taken on merely frivolous grounds, though it failed.

Cullen, Ridgely and Bates, for appellants.

Houston, for respondents.



PHILIP C. JONES and JOHN SPENCER *vs.* DAVID MORRIS.

CERTIORARI.

Judgment was rendered against the defendants below, on the re-

port of referees for \$23 62. The defendants below prayed an appeal. The justice on application of the plaintiff below, granted a new trial, and without the request of either party, ordered the case to be heard by referees. They made a report on the second trial, and the justice entered judgment for a greater sum than that mentioned in the award.

Judgment and proceedings below reversed.



**M. A. MATHEWS and E. J. MATHEWS, def'ts. below, vs. NATHAN.
IEL INGRAM, plff. below.**

CERTIORARI.

Upon the appearance of the parties, the defendants below claimed a trial by referees, who were appointed, and made an award in favor of the plaintiff below, for thirteen dollars and fifty cents; on which judgment was entered. The defendants below demanded a new trial, which was granted. The defendants below again claimed a trial by referees. The persons summoned as referees, after several meetings, reported that they could not agree. The justice then issued an execution on the judgment for thirteen dollars and fifty cents, though it had been opened and a new trial granted.

Proceedings below reversed.



**FRANCIS T. GIBBONS vs. ARCADIA GIBBONS, adm'x. of Doct.
JOHN GIBBONS.**

An attorney in fact, not allowed to prosecute a suit, after express revocation of his authority, though he had previously accepted orders payable out of the fund to be realized by the suit, and had incurred costs in its prosecution.

SUMMONS case. On motion, judgment of nonsuit. Motion in behalf of plaintiff's attorney in fact to take off the nonsuit; and motion by defendant's counsel to dismiss the suit on the written order of plaintiff. Rules to show cause.

Francis T. Gibbons, on the 25th of January 1840, executed a letter of attorney under seal to William Hazzard, appointing him his lawful attorney, for him, and in his name, and on his behalf, to demand and receive for his use from any person indebted to him, all debts &c., due and owing; and to sue for the same; to give discharges, &c., and generally to negotiate, transact and perform all business for him, as fully as he could do if he were present; agreeing to ratify and confirm all the acts of his said attorney lawfully done; and further agreeing not to revoke the letter of attorney before the attorney should have settled a special matter of co-partnership with one William Laws, which was then a matter of difference, under the forfeiture of five hundred dollars.

It was admitted that this matter was settled with Laws immediately after the date of the letter of attorney. On the 14th of February, 1840, William Hazzard made the following acknowledgment to a creditor of F. T. Gibbons.

Mr. P. N. Rust, Sir:—F. T. Gibbons' note to you for fifty dollars, which will mature at about four months hence, will be met at its maturity, if the funds can be had from Dr. John Gibbons' administratrix, or so soon after as they can be collected. In arranging the affairs of Francis and his father's estate, I shall have provision made for your debt.

WILLIAM HAZZARD, *Agent.*

February 21st, 1840, \$9.00. Mr. William Hazzard will pay Rhodes Hazzard nine dollars, out of the funds of

FRANCIS T. GIBBONS.

Accepted February 21st, 1840.—William Hazzard.

February 21st, 1840, \$18 94. William Hazzard will pay to Hazzard and Prettyman, eighteen dollars and ninety-four cents out of any funds in his possession of

FRANCIS T. GIBBONS.

Accepted February 21st, 1840.

October 12th, 1840. Mrs. Arcada Gibbons, administratrix of John Gibbons, deceased, Madam:—Please pay to William Hazzard, my attorney in fact, any sum or sums of money that may have come into your hands, or may hereafter come into your hands, due to me, either as creditor or heir of John Gibbons, deceased.

FRANCIS T. GIBBONS.

Accepted as of the date within.—Arcada Gibbons.

September 29th, 1843, F. T. Gibbons addressed a letter to the court from Baltimore, through Mr. Ridgely, his counsel in this case against Arcada Gibbons, stating that he had compromised that matter with her, and was "entirely satisfied and compensated;" and that he had no claim against his father's estate.

On the other page of this letter was the following.

City of Baltimore, Sept. 29th, 1843.

Gentlemen,

Whereas a certain power of attorney given by me to a certain William Hazzard, to adjust a difficulty then existing between myself and William Laws, empowering him to act as my agent until the same should be settled, and then, to be null and void. I wish to be specially noticed, as he wishes to extend the same to my general business; such, gentlemen, is not, nor never was my *intent, wish, or desire*, and since my return from Missouri, I have repeatedly and often verbally cancelled it, and I now wish it officially and legally so; and do not countenance or authorize any act or will of his, in any shape, to be my *intent, wish, or desire*.

Respectfully,

FRANCIS T. GIBBONS.

The above letters were in the possession of Arcada Gibbons, the defendant in the cause.

The question was whether the court would allow Wm. Hazzard, as the attorney in fact of F. T. Gibbons, to prosecute this suit further against Arcada Gibbons, as administratrix of John Gibbons, after his revocation of the attorney's authority. A nonsuit had been entered on account of the failure of Wm. Hazzard to procure evidence at the last term; but on his affidavit, he now satisfied the court that he had used due diligence to procure the evidence.

Rule to show cause, why the nonsuit should not be taken off.

Frame, in support of the rule.—The question is, whether Wm. Hazzard has the right to prosecute this suit, notwithstanding the order of Francis Gibbons, to discontinue it. If the court find that Wm. Hazzard has an interest in the suit, they will protect it. He has such interest under the order of October 12th, 1840. It is true that order is to pay Wm. Hazzard "my attorney in fact," but this is a mere description of the person, and does not show the want of interest which Hazzard has in the order.

Wootton.—The terms of the order are conclusive. It was given to pay the money to the attorney in fact of Francis Gibbons, and not

to Wm. Hazzard as having any personal interest in it. It proves none.

Rule discharged.

Ridgely and Frame, for Hazzard.

Woollen, for the defendant.



THOMAS WEST, of R., d. b. *vs.* PETER D. SHOCKLEY, p. b., as signee of WM. B. PARSONS.

CERTIORARI.

The judgment to which the certiorari was taken was entered July 6, 1837, and execution issued the same day. The exceptions were sufficient to reverse the original judgment; but as the certiorari issued October 13, 1843, more than five years from rendition of the judgment, it was on this account dismissed. This objection was made by Mr. Cullen, counsel for the plaintiff below. And although the proceeding by scire facias, after the levy under the f. fa., which still remains undisposed of, was erroneous; the Court said this error did not change the nature of the case. The certiorari being dismissed as regards the original judgment, cannot operate on the proceedings by scire facias.



The Lessee of PRETTYMAN WALLS *vs.* JOHN M'GEE et al. tenants.

The jury directed to presume a *patent* from the State on proof of a warrant one hundred and three years old—located sixty-seven years ago—and a possession of eighty-eight years.

Thirty years' possession will not give title as against the State.

An alteration of the record of an old survey unaccounted for, but proved to have been recently done, will not affect rights previously existing under it.

EJECTMENT for ninety and three quarters acres of land in Indian River hundred.

The plaintiff's lessor in this case claimed title under a patent from the State dated in 1842, founded on a general or "floating" warrant and survey; the warrant dated in 1795, and survey made in pursuance thereof in 1842. The warrant was issued by Jos. Russell, recorder of deeds for Sussex county, to Rhodes Shankland, surveyor,

directing him to survey for Daniel Polk, his heirs or assigns, "a piece or parcel of vacant land in Sussex county, not exceeding two hundred acres." This warrant was assigned by indorsement under seal, from Daniel Polk to James Stayton in 1795; from Stayton to C. S. Layton in 1840, and from C. S. Layton to Prettyman Walls in 1842. The warrant was located on the lands in question, and a survey and plot made for Mr. Walls in 1842; and a patent granted to him on payment of the caution money.

The defendant showed a warrant to Robert Lacey, dated in 1741, for one hundred acres of land; located by Rhodes Shankland for Lacey in May, 1777, for three hundred and forty-three acres, including the land in question. The record of this survey was obliterated and altered by a change of lines so as to throw out the land in question, and this alteration was unaccounted for; though it appeared to have been made more recently than the year 1800. The defendant proved a possession in himself for more than thirty years, and a possession in Robert Lacey for eighty-eight years; but showed no connection of title between himself and Lacey; and he could not produce any patent completing the title of Lacey.

The plaintiff's counsel contended, that the possession of M'Gee, though for more than thirty years, being without color of title, would not give title even as against an individual claimant. (*Ang. on Lim.* 73; 5 *Cow. Rep.* 346; 9 *Wend.* 511;) and that a length of possession, such as that, would not bar the right of the State which in this case had been granted to the plaintiff's lessor. (*Ang. Lim.* 366-9.)

Ridgely contra, for the defendants, insisted—1st. That the survey to Robert Lacey in 1777, under his old warrant, divested the title of the State by force of the act of June, 1793, (*Dig.* 544-5,) which provides that titles held under "any grant, warrant, survey, resurvey or patent," made between 1776 and 1792, shall be good and available in law and equity. 2d. That after this lapse of time, viz: one hundred years from the warrant to Lacey, and sixty-seven since the location and survey, the court would direct the jury to presume a patent or grant from the State. He cited on the doctrine of presumptions *Roscoe Evid.* 17; *Coupl. Rep.* 108-10-15; 12 *Viner* 58; 7 *Term Rep.* 492; 20 *Law Lib.* 194; 3 *Stark. Ev.* 1221, n; 2 *Harr. Rep.* 494; 6 *Mass. Rep.* 90. 3d. That the presumptions as to the alteration in the record of Lacey's survey were against the State and against the plaintiff who claimed under the State; for the record is in custody of the State's officers, and the alteration is against the defendant's interest and in favor of the title of the State; and the

inference is that these alterations were recent, because the adjoining tracts located in 1756, 1802 and 1817, all locate up to the original lines of Lacey's survey as to Lacey's land; whereas, either of them would have discovered the vacant land now claimed, if the record of the lines of that survey had then been altered. 4th. That the effect of the alteration of this record, even if it would, unaccounted for, annul the return and survey, would divest no title accruing or held under it. (*2 Stark. Evid. 476.*)

Booth, Chief Justice, charged the jury—that as a general principle, acts of limitation will not run against the State; nor can there be an adverse possession, strictly speaking, against the State such as can be against an individual; yet there are cases where from length of possession—rightful possession—a presumption will arise against the king, or against the State, to quiet the title. The most solemn papers have been presumed after a great lapse of time: grants; charters; even acts of parliament, have been presumed. So in this country grants and patents from the State are presumed after a great lapse of time in conformity with lawful possession.

If Robert Lacey had a warrant one hundred and three years ago; was in possession eighty-eight years ago; located sixty-seven years ago; it is a case where the jury ought to presume a patent from the State. Robert Lacey's entry was lawful, being under a warrant and survey, and being so in possession it is a fair presumption, after eighty-eight years, that the State perfected his title by a patent. This patent being presumed, the title is out of the State; and the subsequent patent to Prettyman Walls conveyed no title. And that is in conformity with the act of 1793, which gives the same effect to these ancient titles by warrant and survey without patent. As to the mutilation of the record, if recent, it cannot divest the title previously vested by it.

The defendant's possession would be good against individual claimants, but thirty years possession is not sufficient against the State; yet the plaintiff must recover on the strength of his own title and not on the weakness of the defendants; he must show a title in himself, which he has not done, unless the State's grant to him was sufficient to convey a title, and this could not be if sufficient is proved from which the jury will presume a previous grant from the State to Robert Lacey.

Verdict for defendants.

Cullen, for plaintiff.

Ridgely, for defendants.

GINSEY INGRAM, widow of Samuel Ingram, *vs.* EDWARD MORRIS.

In a suit for dower, the plaintiff recovered against the purchaser under a judgment entered *the same day* with the marriage, there being no evidence which in fact was first, the marriage or the entry of judgment.

SUMMONS in dower. Plea, that the land was sold on a judgment against the husband, which was a lien thereon at the time of the marriage. Replication and issue.

It was admitted that Samuel Ingram was seized of an estate of inheritance in the premises at the time of the marriage. The judgment upon which the land was sold bore date on the same day of the marriage, and there was no evidence which, in point of time, preceded the other. Yet the title of the widow of Samuel Ingram to dower depended on this question; for if the judgment was a subsisting judgment at the time of the marriage, the sale of the land which was afterwards made in execution of that judgment discharged the land of dower; if the marriage took place before the judgment was entered, the wife's right to dower attached and could not be divested by a judgment subsequently entered.

Ridgely, for the claimant, argued that the claim of dower was a favored claim; and, in the absence of evidence, the jury would imply in favor of dower. He showed that the judgment was entered on a bond, dated many months before, and argued that the delay of entering the judgment should be considered to the prejudice of the party claiming under it; that the burden of proof was on the defendant, who pleaded an affirmative plea in derogation of this favored right. (*Jenkins' Rep.* 274; *Parke on Dower* 2.)

Wootton, contra, argued from the fact of the entry of judgment on the day of the marriage, that the inference should be made that it was entered *before* the marriage, for the very purpose of binding the land so as to prevent the right of dower; that the common usage of the country was, for marriage to take place in the evening, after the usual hour of doing business in the public offices; and that if the marriage and entry of judgment were at the same moment the wife would not be dowable, for his seizin otherwise than as subject to dower, would be only momentary. And such a seizin gives no right to dower. (1 *Johns. Dig.* 518; 15 *Johns. Rep.* 458.)

The jury rendered a verdict for the defendant.

Ridgely, for plaintiff.

Wootton, for defendant.

STUARTS *vs.* REYNOLDS.SMITH *vs.* REYNOLDS.

An execution binds from its delivery to the sheriff, who is bound to levy it on all the defendant's property without special orders.

Fi. fa. issued 25th of April, 1843, levied, &c. Venditioni exponas. Sheriff returns, goods sold, &c.

Fi. fa. issued 3d of May, 1843, levied, &c. Venditioni exponas issued, and returned goods sold, &c.

The Stuarts issued their execution against Reynolds, and laid it in the sheriff's hands on the 25th of April, without any special orders as to the levy, but with orders to summon James Steel as garnishee. Smith, the junior execution creditor, learning that the sheriff had no orders to levy on a crop of corn which was about to be planted, issued his execution and placed it in the sheriff's hands, with special orders to levy on the crop of corn. The sheriff levied both executions at the same time. The proceeds of sale were brought into court by the sheriff, being claimed by both execution creditors; and the court ordered the money paid to the oldest execution.

An execution binds from the date of its delivery to the sheriff; who is bound, without particular directions, to levy it on any property of the defendant that may come to his knowledge. This is the order of his writ; and to depart from it and make the order of preference in respect to each article of property to depend on special orders of the creditors, would be to involve the sheriff, and the law, in great confusion and perplexity.

WINGATE PRETTYMAM *vs.* PETER D. SHOCKLEY.

A charge that plaintiff was about to run away and defraud his creditors, is actionable, with special damage.

This was an action on the case for words. Narr. laying special damage. Plea, not guilty.

The declaration set out, in various forms, a charge that the plaintiff was about to run away from the State, with a view to defraud his creditors; by means whereof the plaintiff's creditors were induced to proceed against him, and break him up.

The plaintiff proved his case as laid; and that sundry of his cre-

editors were induced by the slander to issue executions and levy on his goods; but they did not proceed to a sale.

The defendant's counsel moved the court to nonsuit the plaintiff; because, 1st. Charging a man with an *intent* to run away is not an actionable slander. The charge must be of some crime liable to punishment. The fraud of creditors referred to in this charge, is not a crime. (2 *Leigh. N. P.* 1350; 1 *Stark. Sland.* 21, 23.) Even the charge of actual running away to defraud creditors, much less the charge of an *intent* to run away, would not be actionable. The charge of an intent to murder would not be actionable, unless some act is coupled with the intent.

2d. The special damage set out in the narr. is, that by reason of the slander, plaintiff's creditors (naming them) were induced to issue and levy their executions, and sell the goods of the defendant; and thus did levy their money. The *proof* is, that though some of these execution creditors issued executions, and levied them, there was no sale; nor did they ever levy the money. 3d. It may be actionable to charge a merchant with a fraud; or a person in any particular capacity with breach of duty in that capacity, if special damage accrues; yet it is not actionable to charge a person, holding no particular relation, with an intent to run away; even though the effect of such charge is to induce the creditors of such person proceed on their claims earlier than they would otherwise do. (1 *Stark. Sland.* 190.) 4th. There is no proof that the issuing the executions in this case did the plaintiff any damage. He was insolvent, and not a cent was recovered. He lost nothing. (10 *Johns. Rep.* 281; 1 *Hall. Rep.* [N. Y.] 399.

The Court.

Booth, Chief Justice.—The words laid, if proved, with proof also of special damage, are actionable. The action of slander may be sustained, 1st. On a charge of a crime, (without proof of special damage or malice.) 2d. On charges against persons in a particular profession, (without such proof.) 3d. On charges not actionable of themselves, but which become actionable by reason of special damage sustained. (In which case the special damage must be alledged, and proved as alledged.)

The plaintiff in this case has set out as special damage, that certain creditors (naming them) viz., A. B. C. & D., who would otherwise have forborne and given day and time to said Wingate to pay them, refused to give time and day of payment; but on the contrary, proceeded to levy and make, and did levy and make, their several

debts by sale of the goods of said Wingate Prettyman; and by such sale deprived him of said goods. It is objected that plaintiff cannot recover under this allegation of special damage, because the proof shows that there was no sale of the goods. But may he not recover damages for so much as is proved? If the plaintiff's creditors were by the slander set upon him; and proceeded, when otherwise they would have given time, the damage is proved *so far*, and plaintiff may recover to that extent. He can prove no damage not laid; but it does not follow that he must prove all the damage laid, or fail altogether.

Nonsuit refused; and verdict for plaintiff, six cents damages.

Ridgely, for plaintiff.

Cullen, for defendant.



WILLIAM S. BISHOP, survivor, &c., appellant vs. ENOCH SPRUANCE, respondent.

After execution issued and delivered to a constable, an alias cannot issue until the first be regularly returned.

The presumption of law is that the judgment is satisfied by the execution, until the contrary appear by the officer's return of the same.

APPEAL from the judgment of a justice of the peace.

The respondent filed a pro narr., in debt on a judgment recovered before Francis Hoover, a justice of the peace for Kent county, at the suit of Enoch Spruance, respondent vs. Wm. S. Bishop, the appellant, and Jas. Clark and Chas. W. Smith, for the debt of \$27 95, with costs, on the 24th of February, 1830; which said Clark and Smith have died, leaving the appellant to survive them. Demand \$50. The justice's transcript showed that an execution issued directed to S. Wools, dated February 24, 1830, returnable April 12, 1830, which execution was returned by plaintiff with certain credits endorsed, amounting to \$24. That an alias execution issued Sept. 17, 1836, to John Woodall, returnable the 2d of Jan., 1837, and was returned endorsed with a further payment of \$5, made to the plaintiff, June 26, 1839. Scire facias issued May 19, 1842, by Wm. Ringgold, Esq., against Wm. S. Bishop, the only surviving defendant, to revive the judgment recovered before Justice Hoover, upon which a balance of \$11 60 was now claimed. Scire facias di-

rected to Thomas Hawkins, constable, returnable the 31st of May, 1842. Constable returned sci. fa., served personally May 27, 1842. Appearance; trial; judgment for plaintiff, and appeal.

The defendant pleaded, amongst other pleas, payment; and that the judgment was satisfied by the execution process issued thereon. The case stood at present on a demurrer.

Frame.—Was the debt satisfied by the return of the execution? It is dated February 24th, 1830, returnable April 12, 1830. It was returned *by plaintiff*. While an execution is out, unreturned, I admit the judgment may be considered satisfied; or rather, that no proceedings can be had until the execution is returned; for until then it cannot appear whether the judgment is satisfied or not. This execution was returned *by plaintiff*. Is that a sufficient return?

Bates.—This execution was delivered to Wools, constable, returnable April 12, 1830. Before its return there were payments, in 1830 and 1832. It is returned by the plaintiff, as appears by the record. The return is an official act, and the defendant has a right to know by the return of the officer, whether the officer has received the money, or what has been done on the execution. Plaintiff endorsed the execution with the credits. There is no return under the hand of the constable, which is essential. (18 Com. Law 307, *Wilson vs. Kingston*; 2 Tidd 933; 1 Salk. 318.)

Ordered, that judgment be entered for Bishop, the appellant, on the ground that the party could not issue other execution process whilst the former remained unreturned, the presumption of law being that the judgment was satisfied on the first execution, until the contrary appeared *by the return of the officer*.

Bates, for appellant.

Frame, for respondent.



WILLIAM MOODY, by next friend, vs. BENJAMIN BENSON.

The discretion exercised by justices of the peace, or trustees of the poor, in binding out poor children, may be reviewed on complaint to the court, or a judge in vacation.

Petition to be discharged from indentures of apprenticeship, on the ground of the invalidity of the binding.

The petitioner was bound by two justices of the peace of Kent

county, as a poor child having no parents able to maintain him and bring him up to industry, and in suitable employment.

Frame and *Comegys*, for the defendant, insisted that the adjudication of the magistrates on the question of the ability of the parent to maintain his children was conclusive, and was not subject to any revision by this court.

The first section of the act of 1827, concerning apprentices and servants, authorizes any two justices of the peace or trustees of the poor, to bind "any minor who has no parent, residing in this State, and who has not property sufficient for his or her maintenance; and any minor, who has not parents able to maintain him or her and bring him or her up to industry and suitable employment."

The fourteenth section provides, that if any apprentice or servant according to this act shall have cause of complaint against his master, "for cruelty, ill usage, treatment not conformable to the terms of the binding, breach of contract, the invalidity of the binding, or of an assignment, or other sufficient matter, such person may prefer a petition to the Superior Court, or any judge, praying relief; and the court or judge, shall have power to discharge the petitioner, to order an assignment of the indentures, to give directions concerning the treatment of the petitioner, to rebind the petitioner, and to annex to any order in the premises any terms that they may deem just and equitable.

The Court considered this section as giving them full power of rehearing and revision in matters of binding apprentices under this law; and maintained their jurisdiction to inquire into this question of the ability of the parent to maintain his children, and bring them up to industry and suitable employment. The jurisdiction of the justices or trustees of the poor in this matter, is specially delegated and restricted to certain cases; their acts are invalid unless strictly within this authority, and it would be lamentable, indeed, if there was no power of revision over the exercise of this authority. The terms of the fourteenth section of the law, are sufficiently large to give this revision to the court or a judge; and we think that such was the evident meaning and object of the legislature.

The court proceeded to hear testimony as to the ability of the father of these children to maintain them and bring them up to industry and suitable employment; and on the evidence on this point, they annulled the binding, expressly on the ground that it was not a fit case for the binding under this law.

Bates, gen. and jun., for petitioner.

Frame and Comegys, for defendant.

GEORGE HOUSTON vs. ENOCH SPRUANCE.

Covenants, mutual and independent; conditional; concurrent; construction of. Where mutual covenants go to the whole consideration they are conditions. Where a day is appointed for the payment of money for a thing to be done, if such day is fixed beyond the time the act is to be done, it is a condition precedent, and the obligation of payment conditional.

H., having procured a contract with government to carry the mail on a certain post route for four years and six months from the 1st of January, 1840, sold the said contract to S. for the use of the People's line of stages Company, for the sum of \$1,600, payable "in cash on or before the 1st of January next; the said contract to be assigned by said H., with the consent of the postmaster general to J. R., or any other person said company may name for their use :" Held, that the plaintiff could not recover the \$1,600 without showing an assignment of the contract before the 1st of January, or that he did what was incumbent on him to procure the assent of the postmaster general, and tendered himself ready to make the assignment.

NEW CASTLE, May term, 1844. This was an action of covenant on the following sealed instrument, dated 27th September, 1839:—

"George Houston, of the town of New Castle, Del., contractor on mail route 1801, from Wilmington, Del., to Georgetown, has sold his interest in said contract to Enoch Spruance, of Smyrna, Del., and Elihu Jefferson, of New Castle, for the use and benefit of the People's line of stages company, now in operation on said route; the new service to commence on the 1st of January next; for which the said Spruance and Jefferson promises and agrees to pay the said Houston \$1,600 in cash, on or before the 1st of January next: said contract to be assigned by said Houston with the consent of the postmaster general to Jacob Raymond, or any other person said company may name for their use."

The People's line of stages company, for whose use this mail contract was purchased by Spruance and Jefferson, was a joint stock company, without incorporation. Spruance was the general agent and treasurer, and resided in Smyrna; Jefferson was the agent at New Castle, and Jesse Sharp at Wilmington. This company was a competitor with Houston at the mail lettings in 1839, both being applicants for this route. Jefferson was a member of the company, and present when they determined the amount of their bid; *he was also the voucher for Houston's bid*, which was lower than the offer of the company, and of course obtained the contract, which Spruance and Jefferson subsequently bought of him for the use of the company. Sharp and others who were large shareholders in the People's line were opposed to this purchase, alledging that the contract had been

improperly obtained by Houston through Jefferson's collusion; and they determined to avoid the execution of it, if possible, of which Sharp gave notice to Houston, in the month of December, 1839. Spruance on the contrary was determined that his contract with Houston should be carried out in good faith, of which Jefferson often assured Houston, and also told Houston he had no doubt Spruance would carry it out whether the assignment was made before the 1st of January or not; though he did not waive the assignment. *The assignment was never in fact made.* On the 1st of Jan. 1840, Sharp, at Wilmington, threw the mails out upon the street, and refused to let them be taken in the People's line of stages. Houston got up another line and took them himself. When he called on Spruance at Smyrna, Spruance expressed his regret at Sharp's interference, and then offered to carry out the contract, saying he would take the mails in spite of Sharp's opposition; but Houston said it might result in putting him to the trouble of carrying them whenever Sharp interfered; and, declining Spruance's offer, went on to complete his arrangements for a new line.

This suit was brought for a breach of the agreement. The process was issued, into Kent, against Spruance and Jefferson, and was returned, non est inventus as to Jefferson, though he still lived in New Castle. The suit, therefore, was prosecuted against Spruance alone. This was another circumstance relied on as showing a collusion between Houston and Jefferson.

The plaintiff gave in evidence, the contract declared on, and also the mail contract to which it refers, viz.—for the transportation of the mails on mail route 1801, from the 1st of January, 1840, for four years and six months, at \$612 50, per quarter. He also put in evidence, a letter from the postmaster general to Mr. Houston, dated January 7, 1840, in reference to an assignment of this contract to Jesse Sharp, in which the postmaster general stated that no action could be had on it without the assent of the transferee in writing; referring to the general post office regulations, which were produced in evidence.

A witness was asked if he did not hear Jefferson refuse to allow Spruance to use his name in a suit against Houston for a refusal to assign the contract, in order to show collusion between Houston and Jefferson, and weaken the force of Jefferson's admissions proved on the other side. This was objected to and ruled out, as the declarations of a party co-obligor with defendant made after breach of contract and after suit brought, and offered in evidence for his co-obligor:

The defendant gave in evidence the precipe and writ to the sheriff of Kent county, for Jefferson and Spruance, returned non est inventus as to Jefferson, cepi corpus as to Spruance; also, the contract of Houston with the post-office department; bond of Houston *with Jefferson as his surety*, dated 7th of Nov. 1839, and a letter from Mr. Hobbie, postmaster general, to Jacob Raymond, dated 19th of Dec. 1842, informing him that Houston had never applied to the department to assign this contract to him.

Mr. Raymond proved that the contract was never assigned, nor was there any offer by Houston to assign it to him. The company never directed the assignment to any other person. He had made no application to the post office department for its sanction to an assignment, nor sent on any bond, or offered any surety. He had not refused the assignment, nor done any thing to prevent it.

Alexander Porter proved that Houston had declared he had concluded not to sell the mail contract to the People's line, but should run the line himself. This evidence was admitted under the plea of *non infregit conventionem*.

Court.—The plaintiff has declared on this contract as containing mutual covenants to pay on assigning, or being ready and willing to assign the contract. He avers that he was ready and willing to assign. His declarations that he did not mean to sell to any other, but to run the line himself, *tend* to disprove this allegation.

Jesse Sharp proved notice to Houston that Raymond had been appointed by the company to receive a transfer of the mail contract, and that unless the necessary steps were taken to transfer it, with the assent of the postmaster general, before the 1st of January, the company would not take it.

A printed pamphlet was offered in evidence to show what was the route No. 1801, according to the proposals of government. The pamphlet was sent by the general post office department to the post office in New Castle, and was proved by the deputy postmaster there to have been received at the time the proposals were issued, and that this was the invariable custom of the department. The document was objected to as not being sufficiently proved; and admitted by the court, on the principle that acts of the government may be proved in the usual form of their announcement. The gazette is evidence of public acts; congressional copies of messages, &c. (1 Phil. Eq. 305.)

The declaration contained six counts: 1st. Averring the readiness of plaintiff to transfer the contract, assigned as a breach the

non-payment of the \$1,600. 2d. That the contract was assignable; that plaintiff was ready to assign it, but the company failed to name a person to whom it should be transferred. 3d. That plaintiff was prevented by the company from assigning, and the failure to nominate a person as assignee. 4th. Averring as in second count, and alledging that plaintiff was prevented from assigning the contract by the acts and neglect of defendants. The 5th count set forth the contract in words; averred the readiness of plaintiff to perform, &c., and assigned the breach of non-payment of the \$1,600. The 6th contained a general breach.

The pleas were non est factum; non infregit conventionem; per fraudem; payment; discount; set off, and non performance of a condition precedent.

W. H. Rogers, for plaintiff.—There is no proof under the plea of fraud that will vitiate the contract. The fact that Jefferson backed Houston's bid and became his surety for the performance of his contract with the post office department, is no evidence of collusion to defraud the People's line, much less of fraud in relation to this contract, which was a subsequent matter. Even if Jefferson did give Houston information of the company's bid it would not avoid the contract. (*U. S. Laws, 28th section of act of 1836.*)

What is the legal construction of this agreement? 1st. Is the assignment a condition precedent? 2d. Are the covenants mutual and concurrent? 3d. Are the covenants independent and distinct? I shall claim that the last is their true character. The agreement for the sale of a mail contract on mail route 1801, between Wilmington and Georgetown, is fully proved by the production of a contract on that route, though it does contain a collateral route from Milford to Lewestown. The advertisement for proposals specify the branch route, and the whole was known as the mail route, No. 1801, to which Wilmington and Georgetown are the termini.

"George Houston *has sold* his contract; *for which* Spruance and Jefferson promise to pay \$1,600, on or before the 1st of January next; said contract to be assigned by Houston, with consent of the postmaster general, to Jacob Raymond, or any other person said company may name." I admit that since the case of *Kingston vs. Preston*, the courts look more to the intention of the parties than the words, and incline against holding covenants independent. Houston *has sold*, past; for which *sale* Spruance and Jefferson were to pay \$1,600 by a certain day, or *sooner*. There is then a mere description of the person to whom the assignment was to be made, without

any specification as to time; and there is no case in which such an act can be so linked with the contract as to make a condition precedent. Covenants—precedent, concurrent, independent; what? (3 *Law Lib.* 46, [Platt on Covts. 105; *Ib.* 22; 1 *Leigh N. P.* 679, 682, 687; 6 *T. Rep.* 570, *Campbell vs. Jones*; 23 *Law Lib.* 7, 8; 2 *Steph. N. P.* 1071-2; 1 *Chitty Plead.* 853-4-5; 1 *Saund. Pl. & Ev.* 451-7; 8 *Term Rep.* 160, 278, 287.)

I consider that all the cases in which the covenant goes only to a part of the consideration apply to the present case. The agreement to pay \$1,600 was for the *sale* of the contract, from which defendant derived a benefit; the matter of assignment was a subsequent duty, and might fall beyond the day fixed for payment. There are no words of connection between the covenant to pay, and the covenant to assign. We can recover on any construction of this agreement.

1. If it be a condition precedent, it being proved that we have taken all proper steps to make the assignment, which was rendered impossible by the neglect of the defendant to name a person; or was excused by their waiver of it. (1 *T. Rep.* 642, *Holham vs. E. I. Co.*)

2d. If a concurrent covenant, all we have to show is, that we were ready and willing to assign. (2 *Doug.* 684, *Jones vs. Barkley.*) If I can show that defendant said he would not take the assignment; or said that it made no difference; or neglected to apply to the post office department, if such was his duty, or had received any benefit from the purchase without the assignment, either of these will excuse the performance. (*Ch. Plead.* 355; 5 *Wend. Rep.* 496; 6 *T. R.* 570; 15 *C. L. Rep.* 22.)

The covenant to pay was a personal covenant of defendants. No act was to be done by Houston in reference to them before payment was due; the assignment to the company if not made, is a matter which they only can object to. The defendant's liability is not through the company, but personal. Is there any proof that the parties ever designed that this assignment should be made *before* the 1st of January? Nothing but the solicitude of Houston to do it. The repeated assurances of E. Jefferson, that it would make no difference when done, proves the contrary. Whose duty was it to procure the assignment? Before it could be done the purchaser must offer surety to the post office department and obtain its sanction. The contract itself prohibits an assignment, without the assent of the postmaster general. The evidence proves that the written assent of Spruance and Jefferson must be filed in the department before it would hear any proposition to assign the contract.

The person to whom the assignment was to be made, was left in doubt by the agreement, and it was the duty of the defendants to notify Houston who was to be the assignee, and this in time to procure the assignment.

But they say Spruance offered to carry the mail on the evening of the 1st of January. This was too late. It was after a breach of the contract; and could not excuse him, even if his ability to perform his promise had been proved, which it has not.

W. T. Read and *J. M. Clayton*, for defendant.—Under the issue on the plea of non infregit conventionem the defendant is let into every defence that he could have under any other plea. Though this plea is not good where the covenant is in the negative, it can be objected to only on demurrer; and if the defendant take issue upon it, this opens every defence which shows that defendant did not break his covenant, or that plaintiff ought not to recover. (25 *Wend. Rep.* 373.) But there is another plea on which the defence is complete; that the contract with the post office department was never assigned to defendant, and that defendant never prevented it. Replication to this, “that the People’s line refused to receive the assignment and thus prevented the assignment. The issue is on this replication; and, we have also pleaded the non-performance of a condition precedent.

1st. The assignment is to be made to Jacob Raymond unless the company should appoint some other person. Without any thing further Houston had notice by the agreement, that Raymond was the person to whom the contract was to be assigned. So far from appointing another person, the company appointed Raymond; and notified Houston of this, according to Sharp’s testimony.

2d. Spruance as the guaranteee of the People’s line of stages company, acting for them without any personal interest, agreed to pay, or to warrant that the company should pay, \$1,600, for this mail contract, which Houston was to assign and transfer to Raymond for the company. This is his single covenant. He undertook to do nothing but to pay the money for the contract. He could not get the contract legally without an assignment. Spruance was the treasurer: if the contract stood in Houston’s name, he alone could legally receive the mail money; if it was assigned to Raymond for the company, the mail money would fall legally into Spruance’s hands; and he run no risk of his guaranty, if he was to handle the money. This shows why Spruance required a stipulation for the transfer.

3d. He agreed to pay \$1,600, for the contract, not for the sale; for the whole contract, which he could not get unless the assignment

was made before any part of the contract had elapsed. Neither could the contract service commence on the 1st of January unless the assignment was legally made before the 1st of January. The assignment was to precede the payment of the money; and this makes it a condition precedent. (*Fell on Guar.* 116.)

The refusal by Sharp to carry the mails was not a breach of the contract. Sharp one agent, without authority, refused to carry the mail one morning; Jefferson another agent, Spruance the general agent and treasurer, all offered to carry it, and declared that Sharp would and should comply. Houston refused to let them. The only consequence of Sharp's act would be, to make the company liable to compensate Houston for his refusal to carry the mails that day.

Were these covenants dependant or independent? The assignment in this case was a condition precedent. (2 *Johns. Rep.* 145, *Barruso vs. Madan.*) Whether a covenant is a condition precedent, depends not upon technical words or their position in the contract, but on the meaning;—on the question which party is to do the first act. (2 *Johns. Rep.* 207, *Green vs. Reynolds.*)

Even if it should be held that this is a case of concurrent or dependent covenants, the plaintiff is bound to prove not only that he was willing to assign, but that he was ready and offered to assign: that he tendered an assignment. That is in this case, that he tendered an assignment to Jacob Raymond, and failed only on his refusal or the refusal of the post office department to accept Raymond as the assignee. (4 *Term Rep.* 761; 1 *Hen. Blac.* 270-8, *Duke of St. Albans vs. Shore.*)

Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other. They here go to the whole consideration. To pay \$1,600, for all Houston's interest in the contract; the money to be paid the 1st of January; service to commence the 1st of January, and contract to be assigned to Jacob Raymond. (*Willes Rep.* 157, n. a; 10 *Johns. Rep.* 203, 212-13; *Ibid.* 266; 16 *Ib.* 267; 17 *Ib.* 293; 3 *Law Lib.* 35-6-7, *Platt on Covts* 75, 83.) Where a day certain is appointed for the payment of money, if it is to occur after the time in which the consideration ought to be performed for which the money is payable, the performance of the consideration is a condition precedent. Here the 1st of January was the day appointed for the payment of \$1600; and the consideration for this was the transfer of all Houston's interest in this mail contract. He was bound then to make that assignment before the day of payment. And

Spruance, who is a mere guarantor, was not bound to pay without an assignment. (11 Johns. Rep. 525; 20 Ibid 20.)

No notice was necessary from the company to Houston that he must make the assignment. The agreement pointed out the person to whom the assignment was to be made, unless the company should appoint another, and Houston was bound to call on that person with a tender of the assignment. If the company had appointed another person, it would have been for them to notify Houston of such appointment. But they did not appoint another.

The contract between Houston and the post office department is a contract for a larger service than is covered by this agent, being for carrying the mails on route 1801, between Wilmington and Georgetown, *with a branch between Milford and Lewestown*. The contract agreed for, was a contract on route 1801 between Wilmington and Georgetown only. Houston, therefore, had no power to assign such a contract as he sold.

Mr. Wales replied.

Judge Layton, charged the jury.

LAYTON, Justice:—The foundation of this action is an agreement in writing, made on the 27th day of September, 1830, between George Houston, and Enoch Spruance and Elihu Jefferson.

Spruance is the only party to that agreement who has been called to defend this action. Observations have been submitted, by counsel, in relation to this fact, which the court thinks are in nowise connected with the issues in the cause. The plaintiff at his election, sued out process against both Spruance and Jefferson; and directed it to the sheriff of Kent county. Spruance was arrested and has appeared to the action. There was a return of "non est," as to Jefferson, and the plaintiff thought proper to proceed against Spruance alone without further proceeding to compel the appearance of Jefferson.

We may also, further remark, that the various allegations which have been thrown into this case, in relation to a supposed connexion between Houston and Jefferson, or to any frauds which are suspected to have existed between them, or between Houston and others, are all foreign to the issues joined in this cause, and have no legitimate connexion with it; unless fraud has been proved to have been practised by Houston, in procuring this agreement with Spruance and Jefferson.

In all this we see nothing which should excite prejudice against the plaintiff, or enlist sympathy for the defendant; if, in any case, prejudice or sympathy could be permitted to enter. It is a case of

contract. The questions arising in it are questions of law, connected with some questions of fact, and are to be decided irrespective of the condition and circumstances of the parties, according to the law and evidence.

That this is an important case, may readily be conceded;—important in respect to the sum in controversy; and of the grave questions of law arising out of the contract, and the pleadings in the cause. Hence will appear the necessity of approaching those questions, calmly and deliberately; and with a single eye to the truth.

We feel called on to remark, that this is not a case of *guaranty*. For whose debt, default, or miscarriage, did Enoch Spruance and Elihu Jefferson, become responsible, when they entered into this agreement? We gather nothing from the instrument itself, which would raise such a presumption, as that they had undertaken to *guaranty* any act of performance on the part of the company, for whose use they were purchasing this mail contract. At any rate, they could never have compelled the People's line to accept this contract with Houston, unless they could have shown they were duly acting under their authority.

To understand the character of this contract, and the nature and extent of the liabilities of the parties respectively, we must refer to the contract itself; and give to it, that meaning and construction, which the parties themselves intended it should have. For it is a fundamental principle, that "covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument; and according to the reasonable sense of the words. If there be any ambiguity, then such construction shall be made, as is most strong against the covenantor; for he might have expressed himself more clearly." (1 *Wheat. Selw.* 447.)

There are three kinds of covenants:—First, "Such as are called mutual and independent, where either party may recover damages from the other for a breach of the covenant, and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff." (Campbell *vs.* Jones, 6 *Term Rep.* 570; 2 Johns. Rep. 208, Green *vs.* Reynolds; Doug. 689, Jones *vs.* Barkley.) 2d. "Such covenants as are conditions, and dependent, in which the performance of one depends on the prior performance of the other, and until the prior condition is performed, the other party is not liable to an action on his covenant." (Lock *vs.* Wright, Strange 569; 1 *Wheat. Selw.* 505.) 3d. "Such as are mutual conditions to be performed at the same time, where the plaintiff must show that

he was ready, and offered to perform on his part, and the defendant neglected or refused to perform on his part; and may maintain his action, though it is not certain that either is obliged to do the first act." (*Glazebrook vs. Woodrow*, 8 *Term Rep.* 386; 1 *Wheat. Selv.* 510-11.)

In order to ascertain the intention of the parties, it is considered a good general rule that "where the mutual covenants go to the whole consideration on both sides, they are mutual conditions; and also, that where a day certain is appointed for the payment of the money, if such day is to occur after the time when the consideration ought to be performed, for which the money is payable, the performance of the consideration is a condition precedent to the payment of the money." (3 *Law Lib. Platt on Cov.* 37.) Formerly the construction was more rigid on the terms of the contract, and the leaning was, to construe covenants to be independent, but a more liberal and sensible construction now prevails; and it is now established, that the dependence or independence of contracts, is to be collected from the evident sense and meaning of the parties; and however they may stand in the contract, the order of performance must depend upon the requirements of the transaction, (3 *Law Lib. Platt on Cov.* p. 35; 2 *Doug.* 689, *Kingston vs. Preston.*)

Construing the agreement in this case, by the common sense principle of the true meaning of the parties, and applying the before recited rules as our guides, let us ascertain what the agreement of the parties is, the question being whether the covenant on the part of George Houston to assign his mail contract with the assent of the postmaster general, to Jacob Raymond or other person whom the stage company might name, is a condition precedent to his right of recovering the money stipulated to be paid for it; whether the transfer and payment were to be cotemporaneous acts, and constituted mutual and concurrent covenants, or are independent covenants for the breach of which either party might sue, without regard to his performance of his own part of the bargain. We are to inquire then, whether in point of time George Houston was bound to transfer his mail contract to the stage company before he was paid for it; or was to be paid for it before he assigned it; or whether the assignment and payment were to be contemporaneous and concurrent acts.

There was an act to be done in reference to the transfer, which depended on the consent of a third party, without whose consent Mr. Houston could not perform his covenant, and the People's line could acquire no legal interest in the mail contract. Whose duty

was it to procure that consent? The procuring the consent of the post office department was a matter which required the joint or mutual action of both parties. Jacob Raymond could not procure the assignment of a contract belonging to George Houston, without Houston's application; nor could Houston get the transfer to Raymond without Raymond's written assent. But who was to move in this business? The neglect or refusal of either would excuse the other; but who was to begin? Whose covenant is it? Undoubtedly George Houston's. He undertook to transfer the contract, with the assent of the post office department to Raymond, or such other person as the company might name; and this assignment was necessary to give the defendants the *interest* of Mr. Houston in the mail contract which he sold defendants, "for which" they agreed to pay the money. George Houston was then bound to move in this business; and procure, with the assent of Raymond or other person whom the company might name, the consent of the postmaster general to this transfer. Jacob Raymond was the party, he himself had named in his covenant, to whom the assignment was to be made for the use, &c., unless he should receive notice from the People's line, that they had appointed some other person than Raymond to receive it. To Raymond, therefore, he should have applied to move in this matter; nor was he at liberty to wait for further notice from the company of the individual to whom he should make the transfer. Suppose the postmaster general had refused his consent to the assignment, would Spruance and Jefferson have been bound to pay the \$1,600? Certainly not. It was not a legal right of Houston to assign that contract, otherwise than by the consent of the postmaster general, who might well refuse, for good public reasons, to sanction any assignment to the People's line. And Mr. Houston cannot have the legal right to recover the price of a thing which he had no right to sell, only on the terms of procuring the consent of another, without obtaining that consent; or, supposing that the plaintiff had the right to sell his contract, subject to the ratification of the postmaster general, and that it would require the positive dissent of that department to annul such a transfer, the defendants secured the company against such contingency, by requiring Houston's covenant to procure the consent of the postmaster general. They agreed to pay \$1,600 for Houston's interest in the mail contract, which was an interest sanctioned already by the post office department; Houston sold it to them as fully as he had it, and covenanted for the consent of the postmaster to the sale, without which the defendants could derive no lawful

interest under the mail contract, and without which the defendants could not stand as Houston stood, in the relation of a contractor, or commence service under this contract. This contingency seems to us to settle the question as to the precedency of the transfer of the mail contract, to the payment of the money, which was the consideration for it.

Another matter apparent on the face of the agreement equally fixes this. The service under it was to commence on the 1st of January. Now the legal execution of this mail contract by the People's line of stages company, could not commence until after the consent of the postmaster general was obtained. The agreement stipulates not merely for carrying the mail by the defendants as agents of a contractor, but for executing service under a post office contract *as contractors*, and this service was to commence on the 1st of January. The covenant therefore of George Houston *necessarily* supposes an assignment, which should place the People's line of stages company in the position of contractors, before the time when they were to commence the service of contractors; and this is also apparent from the consideration of the argument, that an assignment after the 1st of January would not be a transfer of the whole interest which Houston sold to the defendants, but only of such part of it as should remain unperformed at the time of the assignment.

As to the *subject matter* of the agreement of the parties, we entertain no doubt that it was George Houston's entire interest, as contractor, on mail route 1801, including the route from Milford to Lewes, as well as that from Wilmington to Georgetown; and these latter words were used merely as words of description of a route, and a service with which the parties were perfectly familiar; because, the People's line of stages company was then in operation on said route, and knew perfectly, the extent of service designated by mail route 1801. There was no mail route 1801, from Wilmington to Georgetown alone; but the route 1801, the interest in which Houston sold to Spruance and Jefferson, included the route from Milford to Lewes.

The declaration contains six counts, in each of which the plaintiff has averred that "the said George Houston had always from the time of making said agreement, well and truly performed all things in said agreement contained on his part to be performed; and was ready and willing on the said first day of January, to assign the said contract, with the consent of the postmaster general, to Jacob Raymond, or any other person said company might name for their use."

By this averment the plaintiff himself has considered this agreement as containing mutual and concurrent covenants, the performance of which he felt himself under the necessity of averring, or at least of a readiness and willingness to perform on the 1st day of Jan. 1840; and we think he has very correctly declared upon this agreement as containing at least concurrent and mutual covenants; and has made the averments necessary under such a view of his case. Having thus declared, he cannot treat them as independent covenants.

The question of fact then is, whether the plaintiff has performed his covenant by procuring the assent of the postmaster general to the assignment, and by making the assignment, or by tendering himself *ready* and willing to make it to Jacob Raymond, or to any other person lawfully authorized to receive the same, for the use of the People's line of stages company. If the plaintiff *has* thus proved the performance of his covenants with the defendant, on or before the 1st of January, 1840, or his readiness, willingness and ability to perform, he is entitled to a verdict for the \$1,600, and interest, by way of damages. If, however, he has not shown that he procured the assent of the postmaster general, as he had covenanted to do, and afterwards made, or tendered, or was ready to make the assignment to Jacob Raymond, or to another as aforesaid, the verdict ought to be for the defendant.

There is no *general* issue in covenant, and the plea of "non infredit conventionem" is a bad plea on demurrer, when the declaration states several breaches. "If it can be pleaded in any case, it must be in the single case where the declaration states a single breach of covenant in the affirmative, and concludes with an affirmative allegation; and so the defendant has broken his covenant." The reason assigned in the books is, that this plea is too general, when several breaches are assigned; and that when the breaches aver non-performance, it is defective—"because two negatives could not make a good issue." (1 *Wheat. Selw.* 529-30.) There is one plea, however, which the defendant has put in on which he relies, and which goes the whole length of this case, in which he pleads "that the said George Houston did not on or before the first day of January, 1840, &c., assign his said mail contract, the interest in which was so sold by him, as is stated in said articles of agreement, &c., to the said Jacob Raymond, according to the tenor of his covenant, &c."

Verdict for defendant.

Rogers and Wales, for plaintiff.

W. T. Read and J. M. Clayton, for defendant.

WILLIAM J. BATE vs. JOSEPH BURR, Jr.

If one sell goods to an agent knowing the principal and give credit to the agent, he cannot afterwards charge the principal.

Additio probat minoritatem; thus A. B., means A. B., the elder, where there are two of the same name; but this may be explained otherwise, according to the fact.

Interest is calculated from the expiration of the credit, where that is agreed on; otherwise by the usage.

This was an action of assumpsit for goods sold and delivered, to wit: certain fruit and ornamental trees.

It appeared from the evidence in the case, that the goods were purchased at two several times by Joseph Burr, the father, for the defendant, his son, who informed plaintiff they were for his son. The plaintiff entered them on the first occasion to Joseph Burr; on the last to Joseph Burr, jun., and he presented the bills to the father, but afterwards altered the first entry by the addition of the word "jun." Joseph Burr, the father, had failed.

Rogers, jr., contended, that under this proof plaintiff could not recover. If a person selling goods to an agent, choose to give credit to the agent instead of the principal, he cannot recover against the principal. (23 *Law Lib.* 144.)

Gilpin, for plaintiff, replied that the entry to Joseph Burr was sufficient to charge Joseph Burr, jun. The addition of senior or junior is no part of the name, and a declaration against Joseph Burr, jun., would be sustained by proof of a sale charged to Joseph Burr. The question is to whom in fact the credit was given. But this fact derives no elucidation from an entry to Joseph Burr, which may mean either senior or junior. The proof is that the trees were purchased by the father for the son; so declared at the time; the son has the trees, and has never paid for them.

Rogers replied, that the principle of law was *additio probat minoritatem*; and Joseph Burr, without any thing more, meant Joseph Burr, sen.

Booth, Chief Justice, charged.—If at the time of sale the seller knows that the person dealing with him is an agent, and also knows who the principal is; and, with that knowledge, chooses to make the agent his debtor, he cannot afterwards, on the failure of the agent, turn round and charge the principal; having once made his election when he had the power of choosing between the one and the other.

(*Addison vs. Gandasequi*, 4 *Taunt.* 574; *Patterson vs. Gandasequi*, 15 *East* 62.)

Interest is to be calculated from the time of the expiration of the credit, when a credit is agreed on by the parties; or is established by usage. Where there are two persons of the same name, father and son, as Joseph Burr, senior, and Joseph Burr, junior, an entry to Joseph Burr would mean the father, without explanation; but if Joseph Burr, the son was meant, that will explain and correct the entry, and the proof of it would sustain a claim against the son.

Verdict for plaintiff.

Gilpin, for plaintiff.

Rogers, for defendant..

COURT OF ERRORS AND APPEALS.

JUNE TERM,

1844.

JOHN HALL *vs.* THE STATE OF DELAWARE.

The sale of liquor by an innholder on Sunday, is not within the act against the profanation of the Lord's day; he being obliged by his occupation to keep a public house of entertainment at all times.

Question reserved by the Superior Court in and for New Castle county, to be heard before all the Judges.

The case came before the Superior Court on a certiorari to the mayor of the city of Wilmington.

John Hall, the defendant, was charged before the mayor with "having done and performed worldly employment and business on the 24th day of March, 1844, the same being the Lord's day, commonly called Sunday, to wit: at the city of Wilmington aforesaid, by selling and delivering to Jacob Rice, a resident of the city of Wilmington aforesaid, a small glass of brandy; the same selling and delivering of said brandy not being a work of necessity or charity, contrary to the form of the act of the general assembly of the State of Delaware in such case made and provided."

The defendant pleaded that at the time of the supposed offence he was and is an innholder in said city of Wilmington, duly licensed by the governor, and as such duly qualified in all respects according to law, and that on the said 24th of March, 1844, he did at the request of the said Jacob Rice, sell to him one small glass of brandy as a beverage and for his refreshment, he the said Jacob Rice being a resident of said city, which is the same matter mentioned and contained in the foregoing charge and complaint, and no other, and which the said John Hall saith is not contrary to the act of the general assembly of this State as alleged in said charge. "Whereupon this 10th day of April, 1844, the said plea and the matters therein stated and confessed being considered, I am of the opinion that the said act is a worldly employment and business, the same

not being a work of necessity or charity, contrary to the form of the act of the general assembly in such case made and provided. It is therefore, considered by me the said mayor, that the said John Hall forfeit the sum of four dollars, to be applied to the use of the poor of New Castle county, according to the form of the said act of the general assembly in such case made and provided.

D. C. WILSON, Mayor."

The exception was that the charge on which the judgment of the mayor was rendered is not within the terms, true intent or meaning of the act of assembly.

The case was argued below by *Rogers* and *Wales* for plaintiff and *Gray* for the State; and was now reargued before all the judges, by *Rogers, jr.* and *Wales* for the plaintiff in the certiorari, and by *Bates, jr.* and *Gilpin*, attorney general for the State.

Wm. H. Rogers, for plaintiff.—This being a penal statute, must be construed strictly and not made to apply to cases out of its plain intentment. The object of the act was to enforce a public observance of the Sabbath by prohibiting what would offend the public sense of propriety. The selling of a glass of liquor by an innkeeper is not within the act. His employment is to keep a tavern, for which he is licensed. The license authorizes the keeping tavern on all days, without any other restriction than the act itself imposes. Any restriction contained in any other statute cannot apply to him unless by clear and manifest reference. His business requires the furnishing to all persons, at all times, such necessaries as they may reasonably require. Liquors are included among necessaries. (1 vol. 192-5) He is bound to keep his house open on Sunday as well as any other day; to receive all guests, under penalties civil and penal. A guest is such whether an inhabitant of the town or not. (1 *Cov. & Hughes Dig.* 808; 1 *Hawke. P. C.* 452; 1 *Salk. Rep.* 388; 1 *Saund. R.* 302; 1 *Smith's Lead. Cases*, 47, 62; 3 *Barn. & Ald.* 287.) The call of Rice for the liquor was a lawful demand which the innkeeper was bound to obey. The original act concerning the Sabbath, (1 *Col. Laws* 184, an. 1740,) provides that no person shall do any servile work, labour, or business on the Lord's day. Sec. 5, prohibits innkeepers from permitting any one to sit drinking and tippling during the hours of divine service on the Sabbath; which indirectly recognizes the right to sell liquor on the Sabbath day, if it do not interfere with public worship.

Bates, jr., for the State.—The offence charged is the selling liquor

to a resident of the town who was not a boarder, nor a traveller; and, I shall contend, was not a guest. The conviction regards this as a violation of the act to prevent profanation of the Sabbath.

1. Is an innkeeper prohibited by the law from selling liquor to such a person? The act prohibits any one to do or perform any worldly employment, labour, or business whatsoever upon the Lord's day, (works of necessity and charity only excepted.) Is the selling a glass of liquor under said circumstances the performing worldly employment? The prohibitions of our act are broader than those of the English statute of 29 Car. 2., or the statutes of any State except Connecticut. "Worldly employment in the usual way of his business" is the restriction of the English statute, and the case cited on the other side was decided on that restriction. If the sale of liquor on the Sabbath at the usual place of business, and in the usual course of business, be not the performing worldly employment, it would be difficult to say what would be. What is the difference between such an act and the selling goods, &c.? 2. Being within the act it is for the defendant to get out of it. He must show himself excused by one of the exceptions, that it is a work of necessity or charity. It will not be contended that it is a work of charity. Is it necessary in itself, or is he under any necessity by reason of his character as innkeeper? His duty as innholder is to furnish accommodations to guests; none others: to keep a house of entertainment. What kind of entertainment? The necessities of a home to those who have no home; to guests. The qualifications of an innholder are, that he has necessaries fit and suitable for the entertainment of travellers, and resides at a proper place or stage for their accommodation. That is the object of establishing taverns. It is the duty of the keeper of a tavern to entertain such guests, and to supply his boarders with necessaries; but it is neither his duty nor his privilege to keep an open bar and deal out liquors to neighbours, who are not travellers nor boarders, on the Sabbath. (3 Jac. Law Dic. 450-1-2.) The innholder is liable for the goods of a traveller, but not of another. (Smith Lead. Ca. Caly's.) Granting for the argument that liquor is a necessary, the innholder is not bound to sell it to any other than a guest. He would not even be bound to sell bread to another. He is not bound to keep liquor at all. He may lock up his bar, not only on the Sabbath, but on every other day. Was the act of selling this liquor necessary in itself? The kind of necessity meant is an actual necessity, such as burying the dead and providing for the sick. The English cases establish that a baker may sell a dinner to

a particular person on Sunday, because the man must eat; but he may not sell bread, generally. (1 Hawk. 15; 2 Burr. R. 785; 5 T. R. 489; Coup. 640; 21 Eng. Com. Law 261.) It is true that this act has not been hitherto enforced, but it is still a law on the statute book; and if the construction which we contend for be true, this court cannot do otherwise, (nor could it do better if it had a choice,) than to wake it up and enforce it.

Gilpin, Attorney General.—The question arises under the statute alone. The object of the act authorizing taverns seems to be the convenience to *travellers* exclusively. Quere. Is a tavern keeper bound to entertain any other; to take a boarder. The courts of this State have decided that any contract made on the Sabbath is void. Quere. If an individual were to go into a tavern on Sunday and run up a score for liquor, could the tavern keeper recover? And if he could not recover the price is he bound to sell? How can the license vary this?

Rogers.—That argument goes too far. If the license will not enable the innholder to recover for liquor, because his contract on the Sabbath is void, he could not recover for a dinner sold to a traveller; though it is admitted he is bound to sell it. A contract necessary to be made on the Sabbath would be sustained, though general contracts might not be.

Wales, in reply.—The question of morals in reference to what the law ought to be, can have no place in the consideration of what the law *is*. This act, passed in 1795, has never before been considered as applicable to innholders. For more than half a century the people of this State have, without an exception, given a construction to this act such as we contend for. The act is similar to the Pennsylvania law of 1705, which was afterwards by supplements, made to regulate the abuse of selling on Sunday. The first section of the act is levelled generally against all kinds of worldly business; yet the subsequent sections enumerate particular occupations. Why are these named if they were designed to be included in the general prohibitions of the first section?

The object of the act is not to compel an observance of the Sabbath by penalties; it would be as unwise as impracticable to attempt to punish the moral offence; but it is merely to prevent such public and open profanations of the Sabbath as will disturb the public quiet and sanctity of the day. Our statute is founded on the English statute 29 Car. 2, ch. 7. Yet under that act selling meat on the Sabbath

has been considered lawful. (4 Blac. Com. 63; 10 C. Law Rep. 61; 3 B. & C. 232; 1 Taunt. Rep. 184. See *State vs. Chandler*, 2 Harr. Rep. 557.)

Conceding the right and the duty of the innholder to entertain *travellers* on the Sabbath, they say that it is not necessary for others; but can there be any necessity for travelling on the Sabbath? So far as the public quiet and the sanctity of the Sabbath are invaded, it is more reprehensible to hold out inducements to the passenger who travels on the Lord's day, than to furnish a glass of lemonade or brandy and water, as a refreshment, to citizen or stranger, in a quiet way, on the Sabbath. Once commence these restrictions and where are they to stop? Why allow a man to shave on the Sabbath; or to clean his boots, or cook a warm dinner? All these may be dispensed with, and usefully so; but these are matters which have been left by universal concession, as the general business of an innholder has been considered, as out of the meaning and object of the act against a profanation of the Sabbath.

In the construction of this act we ought to look at the state of society at the time it was passed. At that day no one imagined that it prohibited a tavern keeper from selling a glass of brandy and water? And its meaning cannot have changed by a change of public sentiment. The cotemporaneous exposition of a statute is important in its construction.

For what purpose are taverns licensed? For general accommodation. I very much doubt the policy of a law that would prohibit the sale of liquor to residents, any more than to travellers and strangers. It might induce many who would be satisfied with a quiet glass of brandy at the tavern, if they could not get it there, to bring it to their homes, and drink before their families. (1 *Taunt Rep.* 184.)

This argument was had before the Chancellor, and Judges Booth, Harrington, Layton and Milligan. Before the judgment was pronounced, Judge Layton resigned his office, and Judge Hazzard succeeded him; so that the decision announced was that of the Chief Justice and Judges Milligan and Hazzard, who reversed the decision of the mayor. The Chancellor and Judge Harrington dissented.

Chief Justice Booth delivered the opinion of a majority of the court.

BOOTH, Chief Justice.—The record in this case sets forth that the defendant was the keeper of an inn or public house of entertainment in the city of Wilmington, duly licensed by the governor, according to the laws of this State: that during the continuance of his license,

to wit: on the twenty-fourth day of March, A. D., 1844, being the Lord's day, commonly called Sunday, he sold and delivered, at the city of Wilmington, to Jacob Rice, a resident of said city, at his request, as a beverage and for his refreshment, one small glass of brandy. For this he was charged before the mayor of the city, with having done and performed worldly employment and business on the Lord's day, contrary to the first section of the act of assembly entitled "An act more effectually to prevent the profanation of the Lord's day, commonly called Sunday." The mayor, after hearing the case, decided, that the act charged against the defendant, not being a work of necessity, or charity, was the performance of a worldly lemployment, contrary to the said act of assembly, and fined the defendant four dollars, the penalty prescribed by the first section.

The question submitted to the court upon the argument of this case is, whether the keeper of an inn, tavern, or public house of entertainment, by the act of furnishing liquor from his bar on Sunday, is guilty of a profanation of the Lord's day, within the true intent and meaning of the said act of assembly?

The first act of the legislature for preventing the profanation of the Lord's day, was passed in the time of our Colonial Government, in the 13th year of George 2d., A. D., 1740, entitled "An act to prevent the breach of the Lord's day, commonly called Sunday." The first section prohibited any servile work, labour, or business, excepting works of necessity, charity, and mercy; and imposed a fine of ten shillings on the offender. On his refusal to pay the fine, he was to be set in the stocks for any space of time not exceeding four hours. The second section imposed simply a fine on carriers, pedlars, wagoners, &c., travelling on Sunday, and on persons selling goods. The third and fourth sections imposed a fine for fishing, fowling, horse-racing, &c., and for gaming and dancing on the Lord's day; and the offender on refusal to pay the fine, was to be set in the stocks. The fifth section imposed merely a fine of forty shillings on every innholder, ordinary, or tavern keeper, who should suffer any person or persons to sit tippling or drinking in his house on said day, during the time of divine service. The sixth section directed that all fines and forfeitures under the act should be levied by distress and sale of the offender's goods and chattels.

This act remained in force until it was repealed by the present act passed the 3d of February, A. D., 1795, entitled "An act more effectually to prevent the profanation of the Lord's day, commonly called Sunday." The provisions of the several sections of the act of

1740, except the fifth section, were substantially re-enacted by the act of 1794. The latter increases the amount of the several fines, but omits the punishment of putting the offender in the stocks; and in lieu of it, substitutes imprisonment. It contains no enactment against innholders or keepers of houses of public entertainment, in any respect whatever; but on the contrary, omits the fifth section of the act of 1740, which prohibited their permitting tippling or drinking in their houses during the time of divine service. It is evident then, in passing the act of 1740, thus made expressly to prevent the breach of the Lord's day, that keepers of inns and houses of entertainment were under the immediate notice and attention of the legislature, as well as carriers, pedlars, wagoners, and the other classes of persons specially mentioned in the act, the exercise of whose business on Sunday, would profane the day. The latter in express words are prohibited from pursuing their respective employments on Sunday, but as to the former, there is no prohibition against their exercising their calling in any respect whatever. It is to be presumed that the legislature gave to the subject that careful attention, which its importance demanded; and therefore, the fair inference is, that they considered any prohibition against the business or employment of the keeper of an inn, tavern, or house of entertainment, unnecessary; and that the only enactment deemed advisable, was that contained in the fifth section against permitting persons to tipple or drink during the hours of divine service. By no reasonable construction then, can this act be considered as including the business or calling of the innkeeper, or any part of it.

To repel the force of this argument it was insisted on by the counsel for the prosecution, that the terms of the first section prohibiting all business of a worldly nature on Sunday, include the case of the innkeeper; and that as furnishing liquor at his bar, was the milder offence; he was therefore, by that section, fined for it only ten shillings; but for the more odious and aggravated offence of permitting tippling and drinking during divine service, he was fined under the fifth section, forty shillings. This however, is begging the question. It takes for granted the very point in dispute; and involves the inconsistency of punishing the milder offence by an ignominious public exposure in the stocks, and exempting from that disgrace, the party committing the more aggravated offence. Besides, if, as is now contended, the furnishing of liquor at the bar of an inn on Sunday, be a business of such a nature, as desecrates the day, and is so destructive to public morals and the best interests of society, it is a little remarkable that

such an offence should pass unnoticed by the legislature, not only in the acts of 1740 and 1795, but in all the various acts of assembly that have been passed from time to time, from the earliest period of our colonial government to the present day, in relation to inns, taverns, and houses of entertainment;—while the pedlar, for the mere act of travelling, however unobtrusively, with his pack or wagon on Sunday, although he neither sells nor attempts to sell an article of his wares, is visited with a fine of twenty shillings by the act of 1840, and eight dollars by the act of 1795. The conclusion, therefore, to be drawn from the two acts, is,—first, That the act of 1740 did not intend to impose any penalty on innkeepers, except for the offence prohibited by the fifth section,—and secondly, That the act of 1795, by omitting that section altogether, did not intend to prohibit the exercise of any part of their business or calling on Sunday. Independently of the plain import of the two acts to be ascertained from an examination of them, a strong argument arises from the uniform construction heretofore given by the legal profession, and from the general acquiescence and tacit admission of all classes of the community on the subject; nor has a single instance occurred from the year 1740 until the present case, a period of one hundred and four years, of any proceeding under the first section of the act of 1740, or the act of 1795, against the keeper of an inn, tavern, or house of public entertainment, for furnishing liquor at his bar on Sunday. It has been reserved for the ingenuity of the present day to discover such an offence. In connection with this part of the case, it may be remembered, that our act of assembly is similar to the English statute 29, Charles 2d.; and to the Pennsylvania act of 1705, against the profanation of the Lord's day: That in most, if not all of the States of the Union, similar legislative enactments have existed and are still in force. But with all the industry which has been put into requisition, and with all the ingenuity which has been brought to bear upon this question, no case has been produced or cited, and it is believed that none can be, from any English or American law book, of any proceeding or prosecution against an innkeeper, or tavern keeper, under any such statute or enactment for profaning the Lord's day, in merely furnishing entertainment on Sunday, either in provisions or liquor. This of itself, affords a conclusive argument, that the exercise in this respect, of the business of an innkeeper or tavern keeper, has never been considered, either in England or in the United States, as an infringement of the respective legislative enactments of either country on this subject.

But as the words of the act of assembly now in force in this State are very extensive in their meaning, it is asked what kind of business was contemplated by the section in prohibiting any worldly employment, labor or business, on the Lord's day? The answer is, no other than such as openly profanes the sanctity of the day, and violates public order and decorum. The law intended to compel the external observance of the day, by preventing the open show, bustle, and tumult of business. Hence, if a person in the privacy and retirement of his own house, engages in business of a worldly nature on Sunday, he is not amenable to the law; although he incurs the moral guilt of transgressing against the injunctions of religion. The municipal law does not undertake to punish the violation of religious duties, unless the individual by such violation, offends against those social duties which, as a member of civil society, he is bound to observe; or unless his evil example is attended with consequences injurious to the community. Therefore, a cook who prepares a dinner on Sunday, a mechanic or merchant who writes a letter of business, or a lawyer who studies his books on that day to prepare a case for argument, although each is engaged in his worldly employment, no one of them is within the prohibition of the act of assembly. For the same reason the keeper of a well regulated inn, or tavern, does not offend against the law by the mere act of furnishing his guests with food or liquor on Sunday. He no more violates good order and decorum, than a private person does, who invites his friends to his house on that day, for the same purpose.

The nature of the employment, and the duties, rights and liabilities of the keeper of an inn, tavern, or public house of entertainment, clearly indicate that the legislature never designed the first section of the act to include his case. Originally an inn, according to the definition of Webster, signified "a house for the lodging and entertainment of travellers;" and a tavern signified "a house licensed to sell liquors in small quantities, to be drank on the spot." When tavern-keepers began, besides liquors, to furnish food and lodgings to travellers, the term *tavern* came to be used as a word of the same sense and signification with the term *inn*. Hence the same lexicographer says, "in some of the United States, tavern is synonymous with inn, or hotel, and denotes a house for the entertainment of travellers, as well as for the sale of liquors licensed for that purpose." Both terms it is apprehended are now synonymous in the United States; and have been so in England, so far back as the reign of Elizabeth. The principles of law therefore laid down in the books,

in relation to inns and innkeepers, are equally applicable to taverns and tavern-keepers, hotels, and public houses of entertainment.

In this State, no person can keep an inn without a license, although the license uses only the words "tavern or public house of entertainment." The mere granting of such license in itself, confers the privilege of retailing liquors. By a late act of assembly passed the 24th of February, 1845, if the party is to be prevented from retailing liquors, the license must in positive terms expressly exclude such privilege. The rights, duties and responsibilities of the innkeeper are regulated by the common law and by statute. In this State, to keep an inn without a license, is an indictable offence. When the innkeeper obtains his license, he takes upon himself a public employment, and he is bound to serve the public. The employment is for the benefit of the public, and not for his own private gain. He is obliged to keep his house open on Sundays, as well as on all other days. He cannot refuse to receive, and furnish with food and liquor (unless liquor is excluded by his license,) all persons who are willing to pay a price adequate to the sort of accommodation provided; and who come in a situation in which they are fit to be received, and demean themselves with proper decorum. If he does refuse, without a reasonable excuse, or if he furnishes unwholesome food or liquor, an action lies against him. He is bound to keep a supply of wholesome provisions and liquors, according to the style and kind of accommodation which he holds out to the public. His charges were at one time regulated by law. By the 8th section (although now repealed) of an act of assembly passed the 13th of Geo. 2, vol. 1, 195, the Court of Quarter Sessions was required annually to settle the rates of liquors; and if the innkeeper charged beyond such rates, he was subjected to a fine. It does not therefore seem reasonable to suppose, that the legislature intended to interfere with the public employment, rights and duties of the innkeeper; or that by mere implication, it can be made a criminal offence in him to exercise any part of his calling on Sunday. The act of 1795 is a penal statute and authorizes a summary conviction. It is, therefore, to be construed strictly in respect to the offences prohibited; and as it contains no express or positive terms against the business or employment of innkeepers on Sunday, but does against the business of other classes and descriptions of persons, it ought not to be construed to repeal the common law by implication, and thus to deprive innkeepers of their rights and release them from their duties to the public. A penal statute, says Best, C. J., 3 Bing. 580, shall not be extended by construction.

No man incurs a penalty, unless the act subjecting him to it, is clearly within the spirit and the letter of the statute imposing such penalty. If these rules are violated, the fate of the accused is decided by the arbitrary discretion of judges, and not by the express authority of the laws.

The present prosecution is under the first section of the act of 1795, which prohibits any worldly employment, labor or business, on the Lord's day. The argument is, that this section includes the case of the innkeeper. Surely then, it prohibits his worldly employment. The result is, that he is subjected to the penalty prescribed by the first section, for keeping his house open at all reasonable hours (which by the common law he is bound to do,) for the entertainment of travellers and other guests. The argument therefore proves too much. Hence it assumes, that all the section intended to prohibit, was the furnishing or retailing of liquor. But on what principle can a penal statute which prohibits a man's worldly business on Sunday, be so construed as to afford him an immunity in the exercise of one part of his calling, and to punish him for the exercise of another part? On what principle is he exempted, when he provides a dinner; and punished when he furnishes a glass of wine or brandy? To escape from this dilemma, the argument further assumes, that it forms no part of his duty to keep or furnish liquor; that to retail it from the bar, is as much a worldly employment, as to retail goods out of a store. It follows by this mode of argument, that as the license of the storekeeper cannot exempt him from the penalty of eight dollars under the second section of the act, therefore the innkeeper cannot be exempted from the penalty of four dollars under the first section.

To this it is sufficient to reply; *First*, that the business of the innkeeper as heretofore remarked, is viewed by the law as a public employment; that his only authority to engage in it, is his license; and that having taken out his license, the law requires him to keep a supply, both of provisions and liquors. He can, therefore no more dispense with furnishing the latter, than he can the former. *Secondly*, there is an obvious distinction between the case of the storekeeper and that of the innkeeper. The latter is not even mentioned in the act; but the sale of goods, wares and merchandise, is prohibited in express terms by the second section. But if the retailing of liquor at the bar is considered as a sale of goods, the proceedings in the case before the court are erroneous; because they ought to have taken under the second section, and not under the first. But a sale in its legal signification, cannot be predicated of the act of furnishing

liquor in a tavern or inn, any more than it can be predicated of the act of furnishing a dinner, or a night's lodging. When entertainment is provided, it cannot correctly be called a sale by the landlord, or a purchase by the guest. The money or price charged, is not for the sale of a dinner, or of liquor, or lodging; but for the accommodation afforded to the guest in furnishing a room, lights, fire, attendance of servants, and all other things that constitute the comforts and convenience of an inn, as well as the eating, drinking, or lodging. Hence it was decided in England, prior to the statute 6 Geo. 4, that an innkeeper under their statutes of bankruptcy, could not be declared a bankrupt.

The whole argument for the prosecution is founded in the fallacy of assuming that none but travellers can be guests at an inn or public house of entertainment; and therefore, although the duty of the innkeeper requires him to accommodate the traveller and entertain him with food, drink and lodging on Sunday, as well as any other day, it is no part of his duty to entertain a person who resides in the same town or city where the public house is kept. Hence, by this process of reasoning, if a traveller arrives on Sunday, the keeper of the public house or inn is bound to provide *him* with a dinner, if required, and with wine or other liquor. If the innkeeper refuses, he is liable to an action. But if a resident of the same place where the inn is kept, having called on the traveller as a friend, sits down to dinner with him, or calls for a glass of wine or brandy, the innkeeper is guilty of a profanation of the Lord's day, under the first section of the act of assembly, and is liable to a fine of four dollars. It seems to be admitted, that under some peculiar circumstances, the innkeeper may perhaps, without incurring the penalty, furnish a dinner to the resident citizen; such as his house being closed, his family absent, or his cook away. The innkeeper, therefore, must particularly inquire into all these matters. If he furnishes the dinner, and they turn out to be untrue, he must pay the fine. If they be true, he is excused for the dinner; but must pay the penalty for furnishing the glass of liquor. No penal statute was ever intended to deal in matters and inquiries of such variety. Webster, in defining an inn, as before referred to, says "in America, an inn is often a tavern where liquors are sold to travellers and others." Who are meant by "others"? Surely persons residing in the same town or city, or its vicinity; all persons who are not travellers. Justice Bayley says, in *Thompson vs. Lacy*, 3 Barn. & Ald. 387, that an innkeeper is bound to receive

all persons who are capable of paying a reasonable compensation for the accommodation provided.

In the *Six Carpenters' Case*, 8 Coke's Rep. 290, it is laid down, that the law gives authority to all persons to enter into a common inn or tavern; and therefore, if a person having entered into the inn or tavern, commits a trespass, as if he carries away any thing; he shall be a trespasser *ab initio*. Why shall he be a trespasser *ab initio*? Because the law gives him authority or license to enter the inn, and not to the innkeeper to exclude him; for if the entry were given by innkeeper's authority or license, the party would not be a trespasser *ab initio*. "And the reason of this difference," Lord Coke says, "is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered. But when the party gives an authority or license himself to do any thing, he cannot for any subsequent cause, punish that which is done by his own authority or license; and therefore, the law gives authority to enter into a common inn or tavern." The six carpenters were not travellers; but nevertheless they were guests. They entered the inn for refreshment—for the purpose of drinking wine; and the innkeeper was bound by the authority of the law to receive them. It was not in his option to reject them.

In *Bennet vs. Mellon*, 5 Term Rep. 173, the plaintiff's servant took his master's goods to an inn, to be left in charge of the innkeeper, as a common bailee for a few days. The inkeeper refused to take charge of them, as he had a right to do. The servant called for a glass of liquor, set down, and put the goods behind him. While drinking, the goods were stolen, and the innkeeper was held liable for the loss. On what ground was he held liable? Not on the principle that to constitute a guest, the party must be a traveller; but because the law having given the party the authority to enter the inn, he was a guest, although he remained there but for a few minutes for the temporary refreshment which he had ordered.

In *Thompson vs. Lacy*, 3 Barn. & Ald. 283, a house of public entertainment in London, where lodging and entertainment were furnished for all persons paying for the same; and which was merely called a tavern or coffee-house, but not frequented by stage coaches, and wagons from the country, and had no stables, was considered as an inn. A person having resided in London, in furnished lodgings, received accommodation in the tavern or coffee-house. He was considered a guest, although he was not a traveller; and the

owner of the house was held subject to all the liabilities of an inn-keeper.

Upon the well settled principles of law, it follows, that all persons who come to an inn, or tavern, or public house of entertainment, in a situation fit to be received, who behave with propriety and decorum, and are willing to pay a price according to the accommodation provided, have a right under authority and license of law, to be received as guests. Therefore a resident of the same town, or city, where the inn is situated, conducting himself with propriety, has a right to enter into it as a guest, for the purpose of entertainment or refreshment; and the innkeeper is bound to receive him. If he behaves in a disorderly manner, the innkeeper, after first requesting him to depart, has a right to turn him out of his house.

But it has been asked, shall the innkeeper be permitted to keep an open bar on Sunday, and allow persons to assemble in the bar-room, to drink and tipple—profane the sanctity of the day, and by the evil example destroy the morals of the community, and the best interests of society? By no means. The common law affords an ample remedy. The keeper of an inn, tavern, or house of entertainment, who conducts himself in such a manner, either in the entertainment of travellers, or other persons, or in permitting such assemblages in or about his house on Sunday, as profanes the Lord's day, or violates public order and decorum, or shocks the religious sense or feelings of the neighborhood, is guilty of a nuisance at common law, and may be indicted, fined, imprisoned, and his house suppressed; according to the aggravated nature or enormity of his offence.

If he suffers any persons to continue drinking or tippling at unseasonable hours of the night, or suffers, at any time, any drunken or disorderly person to remain in his house, or permits any gambling for money, liquor, or other thing, he may be indicted and fined under the first section of an act of assembly entitled "An act concerning public houses of entertainment, and the unlawful selling of liquor or strong drink." (*Dig.* p. 519.) And for the third offence under that act, he is deprived of his license for the space of three years next ensuing his conviction.

The law has thus provided adequate remedies for the evils that may arise from a disorderly inn or tavern, without perverting the act of assembly of 1795 to a purpose never intended by its framers. If retailing or furnishing liquor at the bar of a public house on Sunday, is an evil which ought to be suppressed, it becomes the duty of the legislature of a christian community to prohibit it. But it ought

not to be effected by an assumption on the part of the judiciary, of the power of legislation.

HARRINGTON, Judge.—The defendant below who, according to his plea, is “an innholder in the city of Wilmington, duly licensed by the governor,” was fined by the mayor of that city “for doing worldly employment and business on the Sabbath, by selling a small glass of brandy to a resident of the said city, the same not being a work of necessity or charity.” The defendant’s license authorizes him in the usual form to keep a tavern, or public house of entertainment, which embraces both a tavern and an inn. The legal definition of an inn is a house where the traveller is furnished with evēr̄ thing he has occasion for while on his way.” Our act of assembly requires that the keeper of a public house shall have “necessaries fit and suitable for the entertainment of travellers,” and that his house shall be “situate in a proper and convenient place and stage for the entertainment of travellers.” Both by the common law, then, and the statutes of Delaware, public houses are licensed for the convenience of travellers; to afford a temporary home and needful refreshment to those who being from home, are under the necessity of resorting to such a place of entertainment. Hence it is said in Calye’s case, (8 Co. 32,) “that common inns are instituted for passengers and wayfaring men; for the latin word for inn is *divisorium*, because he who lodges there is quasi divertens se a via; and so *divisorium*. And therefore, if a neighbor who is no traveller, as a friend, at the request of the innholder, lodges there, and his goods be stolen, &c., he shall not have his action; for the writ is *ad hospitandos homines, &c., transeuntis in eisdem hospitantes.*” “So if an host invite one to supper; and, the night being far spent, invite him to stay all night, and he is after robbed, yet shall not the host be charged; *for his guest was no traveller.*” (5 Bac. Ab. 234.)

A tavern is a house licensed to sell liquors in small quantities, to be drank on the spot. It has no reference to any other kind of accommodation, nor any reference to the character of the purchasers of the liquor, whether as travellers or residents. The defendant, as is usual in this State, combines the two occupations, and keeps an inn for the entertainment of travellers, and a tavern for the sale of liquor; both of which he is duly licensed to do; and the question presented to us on this record is, whether in the exercise of this occupation the sale of a glass of brandy on the Sabbath, to a person who is not a traveller but a resident of the same city, is a violation of the act

against the profanation of the Lord's day. That act provides, that if any person within this State shall do or perform any worldly employment, labor or business whatsoever on the Lord's day, commonly called Sunday, (works of necessity and charity only excepted) and be duly convicted thereof, he shall forfeit for every such offence, the sum of four dollars.

If the defendant be exempt from the prohibition of this law, it must be either because the nature of his occupation necessarily conflicts with it, and the law is therefore, as to him, impliedly repealed by another law under which his license is granted; or he must show himself to be within the exception of the statute, by establishing that the act for which he is prosecuted is a work of necessity or of charity. And this has been the defence. It is not pretended that the act of selling the liquor is not the doing worldly employment or business, but the defendant in his plea and in the argument, rests his defence upon his license; namely, that as a licensed innholder and tavern keeper, he is not only authorized, but required to keep his house open for the public, and receive and entertain all guests, travellers and others, on the Sabbath as on any other day, and to sell liquor without any other restrictions than such as are imposed by the law under which he is licensed.

The different terms used to designate the defendant's occupation have caused some embarrassment to the investigation of the duties and privileges growing out of his business. He styles himself in his plea an innholder; which is, perhaps, the best general designation. His license merely authorizes him to keep a tavern or public house of entertainment; which includes under our statute a tavern, inn, ale-house, ordinary and victualling-house. Whatever duties or rights belong to either of these are all combined in his character and occupation as an innholder; which is the highest designation and therefore the best. These several occupations were very distinct by the common law; but the usual distinction in later times is between an inn and an ale-house. Thus the books say, "every inn is not an ale-house, nor every ale-house an inn," but if an inn uses common selling of ale, it is then also an ale-house; and if any ale-house lodges and entertains travellers it is also an inn. A tavern keeper, by the common law was not bound to entertain travellers and provide them with any thing they might have occasion for. His occupation was to sell liquor by the small measure as the retail merchant's is to sell it by the quart or greater measure, and he is not bound, neither is he authorized, to sell his liquor in any other manner or at

any other time than the law allows others. The law which prohibits merchants from selling the quart equally prohibits *him* from selling the gill on the Sabbath day, unless in either case a special necessity is shown. But the innkeeper is bound to entertain travellers at all times and to furnish them with every thing they may have occasion for while on their way; and if this be his *obligation*, it then becomes his *privilege* to furnish a *guest* with liquor, if required, on the Sabbath. I enter into no question whether liquor be a necessary; if called for and used in the course of the entertainment of a guest, it is in the line of that occupation which the law allows to be carried on on the Sabbath day, because it is necessary that it should be done on that day as well as any other. But this does not make it necessary for the tavern keeper alone, or the innholder and taverner combined, to keep an open bar and *sell liquor* as a business to any one who may call for it on the Sabbath, and who has no other connection with the inn as a guest than being a casual dropper-in for the mere purpose of buying a glass of liquor. The occupation of innkeepers is not to sell liquor; their duty extends chiefly to the entertaining of travellers, finding them victuals and lodgings, and securing the goods and effects of their guests. (5 Bac. Ab. 230.) An innkeeper cannot (as a trader,) be a bankrupt; for though he buys provisions to be spent in his house, yet he does not properly sell them, but utter them at reasonable rates considering the attendance of servants, furniture of house, &c. The contracts with innkeepers are not for any commodities *in specie*, but they are contracts for house room, trouble, attendance, lodging and necessaries; (5 Bac. Ab. 229,) all of which shows that the selling of liquor is not within his duty, and therefore not his privilege unless it be connected with the entertainment of a traveller as his guest. A tavern keeper may doubtless sell a glass of liquor without furnishing other entertainment, and he may sell it to a neighbor as well as to a stranger; his license authorizes him to *sell liquor* by the small measure, as well as to keep a house of public entertainment; but the question here is of his right to sell a glass of liquor to a neighbor *on the Sabbath*, though the law prohibits any person from doing any worldly employment, labour, or business on the Lord's day. The defence is not that he has a right to vend liquor, but that being bound to entertain guests he may lawfully furnish the liquor as a part of the entertainment.

The present case turns then on the question whether J. Rice was a guest at the inn of the defendant, and whether this liquor was

furnished him as such. Was he a traveller who had been received at this inn as a guest demanding such entertainment as the defendant was bound to furnish. If he was, the defendant is excused for this act of worldly employment done on the Sabbath, under the plea of necessity, he being compelled to do it. For an innkeeper is bound to receive a traveller as a guest at his house and to entertain him; and it is no defence that the guest was travelling on the Sabbath. (5 Bac. Ab. 232.) If he refuse to receive him he is liable to an action on the case for damages, and may also be indicted and fined. (*Idem.* 232.)

The argument that Rice was the guest of the defendant drawn from the fact that he sold him a glass of liquor is a complete petitio principii. The very question before the court is whether the defendant had a right to sell this glass of liquor; and surely it cannot be an argument that he had the right to sell it because he did sell it. It is conceded that the defendant as an innholder could serve liquor to his guests in the course of their entertainment, but to argue that Rice was a guest because the defendant sold him liquor, and that the defendant sold him liquor lawfully because he was a guest is reasoning in a circle. The act of selling the liquor is unlawful in itself unless it was served out in the way of entertaining a guest; the relation therefore of landlord and guest must exist before the act, and must appear otherwise than by the act, which that relation is to excuse. But looking at the record there is no pretence there that Rice was the defendant's guest otherwise than as the purchaser of this liquor. The prosecution is for "selling and delivering" the brandy; and the plea is that the defendant being an innholder in the city Wilmington, duly licensed, "did at the request of the said Jacob Rice, sell to him one small glass of brandy as a beverage and for his refreshment, he the said Jacob Rice being a resident of the said city." Was the defendant authorized to make that sale on Sunday? Is there any evidence that he had before the sale received Mr. Rice as a guest; and was he bound to receive such a person as a guest in his house?

I have already shown that neither the objects for which inns are licensed nor the necessities of the public require the entertainment of others than travellers; and the cases so expressly confine the liabilities of innkeepers to the case of travellers that even a permanent boarder is not regarded as a guest but as a quasi lessee. (Bac. Ab. 234.) The cases in *Roll.* and *Brownl.* referred to in *Bacon*, are placed expressly on the ground that the guest was a neighbour and no traveller. And it was decided in *Rex. vs. Luellin*, 12 Mod. 445, that an indictment

against an innkeeper for not receiving a sick person, must state that he was a traveller. That is conclusive of this case if it be the law; for if an indictment against an innkeeper for not receiving a guest must aver that he was a traveller, the plea of an innkeeper excusing himself for doing worldly business on the Sabbath by serving a guest, must aver that he was a traveller.

The case of *Grinnell vs. Cook*, a late New York decision, reported 3 *Hill* 485, is full on this point. It was an action by Grinnell, an innkeeper, against Cook, a deputy sheriff, for selling the horses of one Wm. Tyler, in plaintiff's stables without paying plaintiff's bill for their food. The innkeeper and Tyler were both residents of the same town, and the horses were put in plaintiff's stables by Tyler. He claimed compensation for feeding the horses on the ground that they were put there by Tyler, who for this purpose was his guest. The court said, the innkeeper is bound to receive and entertain travellers and is answerable for the goods of his guests. On this account he has a lien on the goods. The lien and the liability must stand together. "Tyler, who owned the property was not a traveller, nor was he in any sense a guest in the plaintiff's house, and I think it quite clear that the plaintiff was not bound to receive and take care of the horses." Again the judge says,—"now in this case, Tyler, who owned the horses, never was the plaintiff's guest; nor was he a traveller or transient person. He was the plaintiff's neighbor." Why was he not a guest? The only two reasons assigned or which could exist, were that he was not personally, and had not been, an inmate of the tavern, but took his horses there: and 2d, that he was no traveller, but a resident of the same town. The first reason is an unsound one, and the case rests and is sustained, entirely on the latter reason, namely, that the innkeeper was not bound to take the horses from a neighbor, and therefore, he was not a guest as he would have been if he had been a traveller. The judge says, the relation of guest to the innkeeper must exist to give him the lien, and he admits that to make him a guest he need not be actually *infra hospitium* at the time the lien accrued. In *Yorke vs. Gre-naugh*, (2 *Ld. Ray.* 866,) it was decided that, "if a man set his horse at an inn, though he lodge in another place, that makes him a guest." And this, though not unquestioned, has ever since been considered as well settled law, as the court said in *Mason vs. Thompson*, (9 *Pick. R.* 280,) when it was decided that to constitute a guest it is not essential that he should be a lodger or have any refreshment at the inn. If a person commits his horse to an innkeeper to be fed he is

a guest although he do not himself lodge or receive any refreshment at the inn. The same law was recognized in *Simpson vs. Hand*, (6 *Whart.* 311, 322,) and in the note to *Smith's Leading Cases* it is shown that *Grinnell vs. Cook* rests solely upon the fact that the person owning the horses was not a traveller but a resident of the town. Had he been a traveller or transient person the innkeeper would have been bound to receive his horses; this would have made him a guest, and the plaintiff's lien would have attached. It is an authority on the very point that rules this case. The defendant as an innholder was not bound to furnish the liquor to Mr. Rice, who was no traveller or transient person and not his guest; he cannot therefore, excuse himself for violating the Sabbath by his plea of necessity.

My opinion therefore, is, that an innkeeper cannot keep open bar and sell liquor to all persons on the Sabbath. He is bound to receive a traveller on that day as on any other day, and to furnish him with refreshments, liquor included; and in thus serving a guest he is not liable to the penalty of the act against the profanation of the Lord's day. It is, as to him, a work of necessity. But he is not bound to sell liquor on the Sabbath day, and not being bound, he is not at liberty to sell it to a person who is not a traveller but a resident of the same place. This is the plain, natural construction of the act to prevent the profanation of the Lord's day, in connection with the acts for regulating innholders, tavern keepers, &c., and it harmonizes them all, and gives full effect to all. It allows the tavern keeper to perform worldly business on that day just so far as the nature of his business requires for public necessity under the exception for works of necessity; and in no other form is he excepted from the first mentioned act. It is a general prohibition of every person from doing worldly business on the Sabbath, and neither in it nor in the acts regulating taverns is there any permission to an innholder to carry on his business on the Sabbath, more than any other; the merchant for instance; either of them can excuse himself for a violation of this general law by a plea that his work was a work of necessity or charity. The merchant may sell clothes to bury the dead, or liquor for the sick on Sunday, and the tavern keeper may entertain guests on this day as on any other day, for this is necessary; but they must be guests, such guests as have a right to be in his house as guests on the Sabbath, and such as he is bound to receive and entertain. A neighbor who has a home in the same town is under no necessity to become his guest, nor is he necessarily entertaining him as a guest by selling him a glass of liquor. It may be that such a person might

become the guest of a tavern keeper, but it ought to be on a special admission as a guest, showing the necessity, as that his own house was closed, or that he was passing from one place to another, so as to make his entertainment at the tavern as a guest convenient and desirable. As in the case cited from *3 Barn. & Ald.* 283, which is the principal case relied on, and I may say *the only case* cited where the guest was other than a passenger away from his own home, and that was the case of a person who had lived theretofore in furnished lodgings in the great city of London, but desiring to change that mode of living, applied at the defendant's coffee-house to be taken in as a guest. He was seeking a home, having no other. The point in the case was whether the coffee-house could be considered an inn; the plaintiff could well be a guest without violating the principle I have assumed. I say this is the only case because the Six Carpenter's case was one of persons calling at a tavern, not on a Sunday, to buy liquor. But Mr. Rice in this case sought in no sense to become the guest of the defendant. He called to buy a glass of grog there, as any customer would on another day call on the retail merchant to buy a quart. Why should the license of the tavern keeper allow him to sell the gill any more than the merchant to sell the quart on Sunday? Upon what principle can it be said that the tavern keeper may sell liquor when the merchant may not, unless it be in the entertainment of a guest? The license authorizes each to sell liquor, generally, as a business; the law prohibits both alike from doing this or any other business on the Sabbath. Both then are alike prohibited; and the tavern keeper only excuses himself by showing that the person to whom he sold was his guest, and such a guest as he was bound to receive and entertain.

These laws must receive a connected construction giving them both effect if we can. We have no authority to repeal either, neither does it repeal either to say it is an old law and has not before been enforced. If the public has borne with the abuse of a law for a long time without bringing it before the judicial tribunals for a construction, it is no reason why the court shall construe it differently from its plain meaning because the public have hitherto acquiesced in a different construction, which the innkeepers have placed upon it for their own profit. It is very easy to account for this construction. The innholder is authorized to entertain guests on Sunday and supply them with liquor, and very slight acts will make transient persons and travellers guests; a slight extension of this privilege which introduces neighbors and loungers, opens the bar for a regular

sale of liquor on Sunday; degrades the inn, which is established for the comfort of travellers, into a tippling house; destructive of their comfort and annoying to the public ; and is an abuse of the privileges which belong to the legal character of an innholder. The construction which I place upon the law, and which I submit, lies plainly on its face, leaves to the innholder all the privileges that belong to him in the entertainment of guests ; protects him against the inroads of idlers on the Sabbath ; prevents the gradual declension of inns into tippling houses, which is far better than punishing them after the indulgence of your law has made them such ; protects the public against this nuisance, while it affords the travelling public all conveniences for which inns were established ; and enforces the law against the profanation of the Lord's day by the open and public sale of liquor at a tavern bar, without necessity and without excuse.

It may be said that this is imposing on an innkeeper the task of distinguishing between travellers and residents, which, in a city, it may be difficult to do ; but it must be remembered that this is an excuse which he offers for violating a general law, and he ought to make it out. He knows, or he ought to know, who are his guests. No one can make himself a guest without his permission; and he may satisfy himself of the propriety of accepting as a guest any one who presents himself on Sunday, especially when he comes merely for the purpose of buying liquor, which the innkeeper has no right to sell to others than guests. And in a doubtful case there would be but little danger of a conviction. But in the present case there is no matter of doubt presented; the record shows and was designed to show, for the case was made for the express purpose of raising the question, that Jacob Rice was a resident of Wilmington, and that he called at the defendant's inn for the purpose of buying a glass of liquor.

The Chancellor said the different views of the question had been so fully presented, that he thought it unnecessary to add any thing further than that he fully concurred in the conclusion, and assented to the views presented by Judge Harrington.

Judgment of reversal.

Rogers, jr. and Wales, for plaintiff.

Bates, jr. and Gilpin, for the State.

[*Note.* Since the decision of the above cause, the legislature by act of February 23, 1847, enacted "that hereafter it shall not be lawful

for any keeper of a public house of entertainment, tavern, inn, ale-house, ordinary or victualling house, to sell any spirituous or intoxicating liquor as a drink, or any other kind of liquor or beverage usually sold at a tavern bar, on the Lord's day; and such sale shall be considered as a worldly employment or business," under the penalties of the act of 1795.]

THE STATE *vs.* GEORGE PLATT.THE STATE *vs.* JAMES ROGERS.

The persons appointed by an act of the legislature as managers to conduct and execute a lottery grant for the benefit of a college, &c., are not entitled to compensation for services, there being no such provision in the law, although they were required to enter into bonds and render important service from which the State derived a benefit. Such persons are not *public officers*, but *trustees*; and the acceptance of the trust being voluntary, the execution of it is no ground of legal claim for compensation. A voluntary trustee is not entitled to compensation other than that stipulated for, though he is entitled to be reimbursed his expenses, the distinction between which is well established.

[*Note.* The Chief Justice did not sit because of his connection as brother-in-law of the defendant in the second cause.]

These suits were docketted by an arrangement between the defendants and attorney general, to try the question of the defendants' right to retain as a compensation for their services, a balance in their hands of a fund received for the State and Delaware college.

By an act of the legislature passed February 11, 1835, James R. Black, James Rogers, Andrew Gray, George Platt and Henry Whiteley, were appointed managers of a lottery for the benefit of Delaware College and other purposes, with power to institute, carry on and draw a lottery in one or more classes, for raising a sum not exceeding one hundred thousand dollars clear of all expenses. They were required to give separate bonds for the faithful discharge of the trusts reposed in them, and to take an oath faithfully to perform them. They were authorized to proceed to draw the lottery themselves; to appoint commissioners to attend the drawing; and, if they thought proper, to sell the scheme, or any class of the lottery, provided they took sufficient bonds and security from the vendees, in which case they were to be exonerated from all liability on account of such persons as they might sell to. The grant was limited to ten

years. The managers were all trustees of Delaware College. Mr. Gray did not act; the others gave bond, and in April, 1835, sold the entire scheme to Yates & McIntyre and D. S. Gregory & Co., of New York, for one hundred thousand dollars clear of all expenses, payable ten thousand dollars each year, with the right of terminating the contract at six months' notice. The vendees gave bond and security. The proceeds of this contract were paid quarterly to Mr. Black, one of the managers, he being also treasurer of the college. After his death, in September, 1839, the managers permitted the treasurer of the college who succeeded him to receive that portion which belonged to the college, directly from the contractors; and the balance, belonging to the school fund and State, they allowed for about one year to accumulate in the contractors' hands, when it was, by their consent, paid over directly to the State treasurer. The amount received from the contractors and paid to the college and State treasury was sixty-six thousand, nine hundred and forty-one dollars, and seventy-nine cents. In consequence of notice from Gregory & Co., closing the old contract, a new one was made with them in April, 1840, very much reducing the sum to be paid by them annually. On the 6th of April, 1842, the managers had in hand the sum of two thousand and fifty dollars, and they subsequently received three thousand, three hundred and fifty dollars. On that day they met and determined upon a compensation of two hundred dollars per annum each, "for services, &c., connected with the management;" and they apportioned the sum in hand in equitable proportions, as they judged, among themselves and the representatives of the deceased managers, Judge Black and Col. Whiteley having died, and their places being supplied respectively by Thomas M. Rodney and John Evans Young, by appointment from the governor.

The declaration was in debt on the defendants' bond as managers of the lottery, reciting all the material facts and assigning as a breach the receipt and non-payment to the college and State of a sum sufficient to cover the balance in the managers' hands. The defendants traversed all the material allegations in the narr., and pleaded several pleas to the breach, the most material of which was, "4th, a set off for services and compensation as managers of said lottery."

The questions therefore were:—

1. Whether the defendants' were entitled to retain the fund in hand as a compensation for their services as managers of the lottery.

2. If they were entitled to compensation, what should be the amount thereof; and this the parties agreed should be settled by the judges.

Ridgely, for the State.—1. Are the managers under the lottery act of February, 1835, entitled to any compensation? The main object of the act was to raise \$100,000 *clear of all expenses in ten years*. Immediately after the passing of the law, the managers sold the grant for \$100,000 *clear of all deductions and expenses*, payable at certain times within the ten years. The managers then, as soon as their agency commenced, determined against running any risk of drawing the lottery, and sold it with an express provision that the vendees should pay the whole amount clear of all deductions and expenses. If they had then had any idea of compensation provision would have been made for it. *The act* does not directly or indirectly provide for compensation. Such compensation cannot come *out of the fund*, for the contract was to pay the full amount authorized, clear of all deductions, *for the benefit of the college and school fund*. The trustees or managers, under the law, have no right to any compensation unless the act expressly gives it to them. They were trustees of the college and the object was to aid that college; they were acting for themselves and could not be entitled to compensation.

The trust was voluntarily accepted, and must be taken on its own terms; they were not bound to serve; but having served voluntarily, they served gratuitously, unless the law provides otherwise.

Trustees are not allowed any compensation unless stipulated for. This applies not only to trustees, strictly, but to all who are invested with a fiduciary character. (*8 Del. Laws* 355; *24 Law Lib.* 222; *Leuen on Trusts* 438; *2 Atk'y. Rep.* 400; *1 Johns. Ch. Rep.* 25, *Green vs. Winter*; *Ibid.* 527 *Manning vs. Ex's. of Manning*; *1 Ball. & Beatty Ch. Rep.* 189; *3 P. Wms.* 251; *3 Harr. Rep.* 110, *Egbert vs. Brooks*.) Independently of the general right of the managers to compensation, the question submitted is whether they have a right to retain this compensation out of the sum raised under the lottery, for the objects of the lottery; and which was to be a *clear fund*. The managers having raised that fund, might have come to the bounty of the State for compensation; or for leave to draw further for their own compensation, which was Judge Black's idea; but here they claim to stop a part of the college fund for their own compensation. These trustees were bound to pay it all over according to the trust, and ought to have gone to the legislature for compensation.

2. As to the amount of compensation, if any shall be lawfully recoverable, the parties agree to submit this matter to the court. These managers had to make the contracts; to go to Philadelphia, occasionally; to make drafts and take receipts. The necessary expenses incident to this were a part of the expenses stipulated to be paid by the contractors.

Wales and Rogers, for defendants.—It is conceded that the expenses of the managers were to be paid; but it is alledged that these expenses were payable under the contract by the contractors. The sum stated in the lottery grant was merely a limit, and no matter of obligation under the contract. It was a grant to the managers or agents of the State to raise by the lottery a sum not exceeding \$100,000. In making a contract with Gregory & Co., these agents were careful to make them stipulate to pay so much per annum and all "expenses attending the instituting, carrying on, and drawing the lottery.". These were the expenses of the contractors, and not the expenses of the managers. It is impossible that this covenant of the contractors can be made to cover the expenses of the managers. The stipulation was for expenses connected with drawing the lottery; expenses which would have fallen on the managers if they had themselves undertaken to carry on and draw it. Having the right to contract with Gregory & Co. for a gross sum beyond expenses, they had the power to include their own compensation as expenses; and the sum beyond both expenses and compensation, was the only sum to be paid over as the nett proceeds of the lottery. Admit that the managers had the power to discriminate between the nett fund and the expenses, the right to deduct compensation as a part of the expenses follows.

It is argued that they are not entitled to compensation because the act does not expressly give it to them. It does not give any compensation to the lottery commissioners, and yet there is no question about their right to compensation. There was no connection between these defendants as trustees of the college and managers of the lottery. The identity was merely accidental. The college was entitled to only a share of the proceeds. The governor was authorized to fill vacancies without any reference to their being trustees of the college. The construction of this act as to compensation is to be made not only on the terms of the act, but in reference to the existing law of the land. These managers were to come under heavy obligations by bond, by oath of office, by extensive and complicated duties running through ten years,—is it likely

that this obligation should have been imposed or taken without any idea of compensation? Whatever is necessarily implied in a law is as much the law as if embodied in express terms. The object of the act was to raise money for the benefit, not merely of the college, but of the State. It was to raise funds for the State. The grant is unlimited, except as to amount and time. Every power necessary for carrying it into execution was given. It was a grant to the managers *as agents of the State*, acting under oath and bond, of full power to raise a sum not exceeding \$100,000, and all expenses besides. The act contemplated that the managers should themselves proceed to institute, carry on, and draw the lottery, pay prize tickets, appoint agents to sell, and commissioners to draw, &c.

The managers were not only authorized but required by section 2, to appoint three commissioners to attend drawings of the lottery. Were these to have no compensation? None is expressly given by the act, yet its objects could not be carried out without their appointment, and this could not be done without paying them. And if the compensation of commissioners appointed by the managers is necessarily embraced in the law, much more is the compensation of the managers. If the money which would have been made by drawing the lottery would have been subject to these deductions for expenses and compensation, the fund arising from a sale of the scheme must equally be subject to such deductions. *Expenses* meant not merely the payment of money, but every thing which might be necessary to carry out the objects of the act.

The managers have been called "*trustees*," and they were so in the same sense that every other public officer is a trustee; but they were *more* than trustees, they were managers; agents of the State, performing service *for* the State; and from which service the State derived benefit. The English doctrine as to trustees not being entitled to compensation, is not the law of our State, except in the case of a purely voluntary trustee. In this country the great principle is, that he who bestows his labor for another, is entitled to adequate compensation, whatever may be the character in which he is employed. The English doctrine was founded on the policy of the times when the church had nearly engulphed all the property of the kingdom in the hands of trustees. This policy never extended to this country; and at best, policy is a bad ground of legal judgment. (*3 Harr. Rep.* 219, *Bayard vs. McLane*.) In most if not all the States, this English doctrine is repudiated,—in Pennsylvania expressly. (*1 Baldw. Rep.* 163.) In New York, though formerly followed, as

in the case cited from 1 *Johns. Rep.* 25, 37, it is now otherwise. In Delaware all trustees are entitled to compensation—executors, administrators, guardians, assignees of insolvents, trustees appointed by the Orphans' Court and Court of Chancery to sell land or perform other duty. If the principle be admitted, it is equally operative when the compensation is implied as if expressed. Whenever the right to compensation or expenses exists, it is implied without any express provision. (10 *Law Lib.* 69, *Willis on Trustees* 147; 24 *Law Lib.* 224, *Lewen on Trusts*; 8 *Vesey Rep.* 8; 18 *Ibid.* 253.)

The case of Egbert and Brooks does not controvert this. The trust was there accepted without any intention to charge compensation, and the trustee had been guilty of a breach of trust, which is a forfeiture of compensation. It was also the decision of a court of equity under the peculiar doctrines of equity, and is not applicable to a court of law; and it was purely a voluntary trust.

In all cases of service to the State, the legislature has uniformly recognized the right of compensation; even in cases of lottery grants. (2 *Del. Laws* 1189; 8 *Ibid.* 362; 9 *Ibid.* 539, 546.) The principle of the constitution that no man's property shall be taken for the use of the State, without compensation, applies equally to individual services rendered under the requirements of an act of assembly. The act is a contract with the managers, (*Dart. Col. case*, 4 *Wheat. R.*) and the bond of the managers is without consideration, unless a consideration arises from the right to compensation. Where services are rendered for the State by direction or request of any branch of the government, there is a *legal* right to compensation, though nothing be expressly stipulated for. (7 *Peters' Rep.* 1, *U. S. vs. McDaniel*; *Ibid.* 18, *U. S. vs. Ripley*; *Ibid.* *U. S. vs. Fillebrown*; 15 *Ibid.* 336, *Gratiot vs. U. S.*)

2. As to the amount of compensation. It must be estimated by the nature of the service; the character of the agents, and the whole circumstances. The ordinary commission on the receipt and payment over of money is five per cent.; which would be a sum much greater than is charged or claimed here.

Gilpin, Attorney General, in reply.—The question for me to argue is not how much these defendants *deserved* for their management of this lottery. If they have rendered to the public important services gratuitously, they have their reward from public approbation; if they rendered these services for the benefit of the college with which they are connected as trustees, they must look to that institution for compensation, if any other be claimed than its ap-

proval; if they claim other than honorary rewards from the public, they should lay their case before the legislature. The question before this court is, whether they have any *legal right to retain compensation* for their services out of the fund entrusted to them for other purposes. Does the law provide for this?

What is the history of this law? In 1823, the Delaware College was incorporated by the legislature, on the recommendation of governor Bennett, whose secretary of State, the defendant, James Rogers was. He and the other defendant, Platt, were trustees of that college. In 1835, this lottery act was passed for the benefit of the college, of which these managers were all trustees. It was a grant to the defendants *for their own benefit*, they being members of the corporation. The State made to them a donation of \$50,000, and now they ask compensation for receiving the gift. Can it be possible that these gentlemen in accepting, or the State in making, this grant for the benefit of the college which they represented, contemplated that compensation was to be made to the trustees for the services necessary to realise the benefits of the grant.

The contract which they immediately after made with Yates & McIntyre and D. S. Gregory & Co., proves the same thing; for, having the power to raise the nett sum of \$100,000, for the college and other purposes, they contracted with the managers for just that sum, over and above *all expenses*. The term "expenses" used in the law, is used in the contract; so that if the expenses in the act is broad enough to cover a claim for compensation, it is equally broad in the contract, and is to be paid by the contractors. But the term expenses means no such thing. It means expenditures, and not pay for personal service. Expenses, charges, costs, disbursements, indemnity, allowances, are all synonymous when applied to trusts; and mean a restoration of that which has been paid, laid out or expended. (*24 Law Lib.* 229.)

It is obvious that the defendants did not consider themselves entitled to compensation *out of the fund*. They were authorized to raise \$100,000, clear of all expenses, *for the college, &c.* They sold the grant for that sum clear of all expenses, thus "raising" the full amount authorized by the grant, clear of all expenses. Who was entitled to this? the beneficiaries under the law; the college, &c. Every dollar of it belonged to them, and these trustees were bound to pay it over—all of it, in the performance of their duty. The act says that all the money raised under the grant, after deducting expenses, shall be applied to the college, &c. If this money was the

fund raised under the grant it was specifically granted, and the managers had no right to divert it from the objects of its appropriation.

Even if the managers were entitled to compensation, it could not be out of the fund thus specifically appropriated, but must have been by extension of the grant, or by donation from the legislature out of the State funds. And this seems to have been the idea of Judge Black; who, according to the testimony, spoke of drawing on for compensation. None of them ever intended or supposed that compensation was to be deducted from the fund paid by the contractors.

There being no right to compensation to be implied from the law, is there any on equitable grounds out of the act? Take the case of public officers, which these have been likened to. Suppose an officer appointed by law to do any duty, and there be no compensation provided, if the officer accept the office and do the duty, he can recover no compensation; much less retain public money in his hands. If he so accept office, his only remedy for compensation is by petition to the legislature. But these are not public officers or agents; their true character is that of *trustees*; appointed to execute a trust in behalf of others; giving bond to execute their "trust;" taking an oath to perform the trust. And the principle is with regard to all such trustees, that they are entitled to no compensation, only the reimbursement of "*expenses*." But they say these defendants are divested of the character of trustees, and taken out of the principle in relation to compensation, by giving bond and taking oath. I deny it, and maintain that the only test is, whether they *voluntarily* accepted this trust without stipulation for compensation, or was it thrust upon them. A man makes his will and makes me his executor, with directions that I shall give a bond and take an oath, and with duties in reference to his estate which would take all my time, I am not bound to accept the trust; I may do it or not as I please; but if I do accept and give bond and take the oath, I must do it without compensation. The giving the bond and taking oath is as much voluntary as the accepting the trust. Apart from the statute, neither an executor or administrator would be entitled to any compensation, though they give bond. (*Wms. Ex'rs.*) Being voluntary trustees without stipulation for compensation, they are entitled to none. That is the law in England; in New York; in Delaware.

My answer to the cases cited on the other side is 1st. They were officers of the U. States bound to obey their superior, and ordered by their superior to do services not within their office. In M'Daniel's case the judge says he had no discretion, but was bound to obey the

order of the head of his department. So in the other cases. 2d. The right of setting up a claim for compensation for extra services accrued from and was given by an act of Congress of 1797. (*Gordon's Dig.* 50.) Before then they had no such right. (6 *Wh. Rep.* 135, *U. S. Wilkins*; 9 *Ibid.* 651.)

2d. The amount of service. It is not my duty to undervalue the services rendered. However great they may have been, they were *voluntary*: undertaken for the benefit of the institution which the defendants represented, and the State, of which they were distinguished citizens; voluntarily assumed for great public benefits, without any stipulation for, or idea of compensation to the trustees or managers.

This argument was had at the June Term, 1844, before the Chancellor, and Judges Harrington, Layton and Milligan. Judge Layton resigned before judgment; and the case was at the next term submitted on the previous argument to the Chancellor and Judges Harrington, Milligan and Hazzard.

The Chancellor pronounced the opinion of the court; Judge Hazzard dissenting.

JOHNS, JR., Chancellor.—The legal question in this case submitted to our consideration is, whether the defendants have a right to retain out of the money received by them from the purchasers of the lottery scheme, any and what sum as their compensation; the expenses actually incurred having been paid.

The lottery act for the benefit of Delaware College and other purposes, authorized the persons therinafter appointed managers, to institute, carry on and draw a lottery in one or more classes, for raising a sum of money not exceeding \$100,000, clear of all expenses; and the said sum when so raised, was declared by the act to be applicable in the following manner, namely: \$50,000 thereof for the use and benefit of Delaware College, and \$25,000 thereof for the use of "the fund for establishing schools in the State of Delaware, and \$25,000 thereof to be paid into the treasury of the State, for the use of the State."

The second section appointed the managers, and provided that the said managers, or a majority of them, before entering upon the duties required of them by the act, should give separate bonds to the State of Delaware, each in the sum of \$10,000, conditioned for the faithful discharge of the trust reposed in them by the several provisions of the act; and that those only of the persons named should

be managers of the said lottery, who should give bonds as above required.

The third section provided for the drawing of the lottery by the managers, and payment of prizes.

The fourth section enacted, that if the said managers shall deem it expedient for effecting the objects of the act, to sell or dispose of the scheme of the said lottery, or of any class or classes thereof, to any person or persons residing out of this State, it shall and may be lawful for the managers so to do: *Provided*, the said managers shall take from the person or persons to whom they may sell or dispose of the scheme of the said lottery, or of any class or classes thereof, a bond to the State of Delaware in such penal sum and with such surety as the governor of the State shall approve, conditioned for the faithful discharge of the trust that may be thus reposed in such person or persons; and in case bond and security be so taken and approved, the said managers shall be exonerated from all liability on account of the person or persons to whom they may so sell or dispose of said scheme, class or classes of said lottery.

The sixth section, provided that all money raised by virtue of the act should be applied to the objects and uses aforesaid; and that the said money "shall be paid over by the said managers."

The seventh enacted, that the act should continue and be in force for ten years from its passage and no longer.

The managers who gave bond as required by the act, and accepted thereby the appointment, proceeded to carry into effect the provisions of the lottery act. Not deeming it expedient themselves to institute, carry on and draw the lottery, they adopted the mode prescribed by the fourth section, and made sale of one-fifteenth part of the sum authorized to be raised, to Yates & McIntyre, clear of all deductions and expenses for eight calendar months, from the 13th of April, to the 31st of December, 1835, both days inclusive, for the sum of \$6,666 66; and to Dudley S. Gregory fourteen-fifteenth parts of said sum for nine years, one calendar month and ten days, from January 1st, 1836, to February 10th, 1845, both days inclusive, for the sum of \$73,333 34, clear of all deductions and expenses. By the terms of the contract expressly providing, and the purchasers agreeing, from time to time well and truly to pay, discharge and satisfy all expenses, costs and charges whatsoever, attending the drawing of each and every class of the said lottery during their several and respective terms aforesaid; and shall and will take upon themselves and pay, bear and sustain all risks, hazards, losses and ex-

penses whatsoever, attending the drawing of each and every class of said lottery, with tickets on hand unsold or otherwise, or in any other manner whatsoever arising out of or attending the instituting, drawing, or carrying on the said lottery, or any class or classes thereof. Bonds and security as prescribed by the act were by the contractors executed, approved, and deposited with the State treasurer.

From this brief statement of the case, it is apparent all expenses incident to the instituting, carrying on and drawing of the lottery were fully provided for in the contract of sale; and therefore the money received by the managers is in their hands, clear of all expense that accrued by instituting, carrying on and drawing the said lottery. It represents the value of the grant exclusive of all expense. We thus arrive at the simple question, whether it belongs to the parties, severally, for whose use and benefit the lottery act was passed, or is subject to deduction on account of any claim made by the managers for compensation.

It is not a claim founded on actual expense we are called upon to consider, nor that either in law or equity can be entitled to that character. But for the purpose of arriving at a proper conclusion as to the legal right of the managers to retain, it may be well to ascertain their relative position under the act. From the manner of their appointment it is evident the act left the acceptance thereof conditional, and altogether voluntary; and by express and clear language defines the duty to be discharged under and according to its provisions to be a trust. Hence we cannot disregard the explicit and unequivocal declaration contained in the act itself, and therefore feel bound to regard the persons appointed managers as trustees; and, inasmuch as their acceptance by executing bonds was optional, and they chose to do it, they are therefore voluntary trustees.

Having thus ascertained the character of the persons appointed, and that of the duty to be discharged, it becomes necessary to consider and inquire whether the lottery act will warrant us in sustaining their claim to compensation, for receiving and paying over the sum paid them by the contractors. Unless the claim can be supported under the first section, it does not appear to be sanctioned in any other part of the act. The first section contemplates the raising of the sum therein mentioned, by instituting carrying on and drawing the lottery, and provides for the payment of all expenses. The contract of sale, transferring this power from the managers to the contractors, has conferred upon them full authority, over and above

the sum of \$100,000, to reimburse themselves all expenses. Hence it is manifest, the managers by their own act, have conferred all the power contained in that section of the act, designed by the legislature to provide for the payment of expenses. The whole time having been sold, it has been exhausted. But it may be said the words of the section being "a sum not exceeding \$100,000 clear of all expenses," that the managers have a right to deduct from the sum received by them, inasmuch as the limitation is upon the amount beyond which they could not go, and does not fix any sum certain as a minimum. This mode of expression in the first section was no doubt adopted to authorize the payment out of the sum raised, of all expenses which should accrue or be incurred by the managers in the legitimate exercise of the power granted. But can it be that in authorizing payment of the expenses of the lottery, it was the intention under the expression, "all expenses," to provide for an allowance of compensation to the managers. It would seem that such an allowance not being understood according to the common acceptation of the word as included or embraced by it, ought to have been expressly provided for; especially, when the service to be compensated required some rule of adjustment, and ought to have been settled by some mode of estimating the value thereof, either as a salary or a commission upon the amount received and paid over. The expenses or expenditure on account of the lottery, was a matter that could with propriety be left to the managers to adjust, settle and pay, since they could have no interest in increasing the amount so applied. But if under the authority to pay expenses, they should be allowed to compensate themselves, it is apparent they are constituted their own paymasters, and become the judges of, and estimate the value of their own services, not on the principle of reimbursement for what they have expended, but as compensation for services rendered by them as trustees. We may from such a result perceive the propriety of the rule which precludes a trustee from compensation, unless settled by the deed of trust, although he is entitled to be reimbursed all expenses; and, it is further apparent, there is good reason for preserving the distinction between expenses and compensation. In remarking upon the rule, and the distinction, Chancellor Kent, in the case of *Green vs. Winter*, 1 Johns. Cha. 27, observes, nothing can be stronger or more explicit, than the uniform language of the English Court of Chancery upon this point, and even if he was free from the weight of authority, he should hesitate greatly before he undertook to question the wisdom or the policy of the rule.

It has been urged in the argument of this case, with a view to obviate the effect of this rule relative to compensation, that the general policy and universal practice and usage of the State, and every branch of the government, has been to allow compensation for services rendered without any express or previous stipulation. This ground relies upon the practice and usage, and must therefore, be considered independent of the lottery act. The existence of any such policy, general practice or usage, has not been made to appear by any thing presented in this case, or that has occurred within the range of our observation. The two lottery acts referred to in support of the position assumed, appear to recognize a contrary policy, practice and usage, inasmuch, as without the express provision, it may be said the allowance could not have been made. The acts referred to are two, the first, that of 1789, authorizing a lottery to raise a fund for building piers in the river Delaware; and the second, an act for the benefit of Sussex county. These acts respectively imposed upon the managers the additional service or duty, after they had raised and received the money, of disbursing it; the former, in building the piers; and the latter, in constructing the public buildings; the compensation being made expressly on account of the extra labor and service in applying the fund, in executing the objects of the grant; and limited accordingly, in the first case, by a per centage on the amount disbursed; and in the last, by the determination of the Levy Court of Sussex county, authorizing only such an allowance as that court, on adjusting the accounts, should deem proper. From the special provision upon the subject of disbursements as contained in the two acts referred to, making an allowance for special service, when none is provided for the receipt and payment over of the general fund, we consider nothing can be deduced that would warrant us in recognizing the existence of any such general practice or usage sanctioning compensation to lottery managers independent of express grant.

Another ground relied on in the argument of this case would sustain the claim as legally due to the defendants, in consequence of their holding the appointment officially, and not in the character of trustees; and in support of this view of the case, our attention has been directed to the decisions in favor of claims made by officers of the United States, for compensation on account of extra services. Supposing the defendants to occupy an official station, the reason in favor of extra allowance to the subordinate officers in the United States, performing extra service in obedience to the orders of their

superiors, does not apply ; and therefore, those decisions cannot be considered applicable or entitled to any influence in determining the question submitted to our consideration. But independently of the principle established by those decisions, we apprehend the defendants cannot claim as occupying an official character ; for the eighth section of the third article of the Constitution of Delaware, provides : That the governor shall appoint all officers whose offices are established by the Constitution, *or by law* ; and whose appointments are not therein otherwise provided for. The lottery act we are considering makes the appointments originally, and only authorizes the executive to substitute or supply vacancies. Hence we cannot recognize the defendants as entitled officially—therefore, it necessarily follows they must be regarded as agents ; to whom, by a legislative act, power has been delegated, and that power, being confided to their action for the benefit of others, constitutes them on acceptance thereof to all intents and purposes trustees.

The court ordered a certificate to the Superior Court, that the defendants were not entitled to any sum as *compensation*, but that there was due to the legal representatives of the late James R. Black, deceased, the sum of one hundred dollars for *expenses* ; and also the sum of one hundred dollars to the defendant James Rogers, ascertained and allowed by the court, under the special agreement in this cause ; and upon this principle, the amount appearing due from the defendant, James Rogers, on the 10th of June, 1842, was \$3,100 ; and with interest to the 10th of June, 1845, \$3,658 ; and the amount due from the defendant George Platt, on the 10th of June, 1845, \$1,652 ; for which sums and the costs, judgment was directed against the defendants, severally.

Gilpin, Attorney General, and Ridgely, for the State.

Wales and Rogers, jr., for defendants.

SUPERIOR COURT.

FALL SESSIONS,

1844. (a)

RHODA WILSON, Administratrix of JAMES B. WILSON *vs.* DANIEL HUDSON.

Slight acts of meddling with the goods of a deceased person, will make one liable as an executor de son tort.

A sale of the goods will so charge the seller; but will not change the title to the goods, even though the person selling afterwards administer.

SUSSEX, October Term, 1844. This was an action of trover for a yoke of oxen and a cow and calf belonging to the estate of James B. Wilson; and which the defendant resisted as a purchaser from the plaintiff under the following circumstances:—

James B. Wilson died the 23d of March, 1843, leaving this and other property; but being involved in debt to more than its value, the widow was advised to let the creditors divide the property until they were satisfied, and take the residue herself. The defendant, D. Hudson, was one of the creditors. They divided the property by a sale. Each article was put up and the creditors bid for it. D. Hudson bought the cow and yearling, with plaintiff's consent, at this sale. There was no advertisement of the sale, but the property was previously appraised. Immediately after the sale, in consequence of notice from the Register, the widow administered; all the creditors gave up to her the property they had bought at the sale, except the defendant, who refused to do so. This action was brought to recover the value of that portion which he had purchased and taken away.

(a) *Memorandum.*—In the vacation previous to this term, to wit: on the 22d of July, 1744, Judge Layton resigned his office of Associate Judge of the State; and the Hon. David Hazzard, of Sussex county, was on the 10th of December, appointed to succeed him.

Cullen, for the defendant, asked the court to charge:—

1. That Rhoda Wilson and all concerned in the sale were executors de son tort, and that her subsequent administration legalised the sale. (*Wms. Ex'rs.* 142; *Ibid* 137; *8 Johns. Rep.* 125; *15 Mass. Rep.* 307, 328.)

2. After a sale and delivery the goods cannot be recovered back though the purchase money be not paid. (*6 Wend. Rep.* 83.)

3. A sale of personal property is a warranty of title. (*1 Johns. Rep.* 274.)

Houston, contra, cited *2 Leigh. N. P.* 972.

By the Court:

Booth, Chief Justice.—Administration gives to the administrator the right of possession of the intestate's goods. He has the same possession as the intestate. The law requires that on the decease of any person, administration should be granted, in order that the debts may be paid according to law. If any person without such administration, meddles with the property of the deceased, by any act of administration, such person will become an administrator of his own wrong, and liable as such. On the proof in this case, Rhoda Wilson and the defendant, by the irregular sale of the property of the deceased, which they conjointly made, became executors de son tort. This sale was illegal; an act of illegal administration; and did not carry the property to the defendant. It is said, because Rhoda Wilson afterwards administered, that this legalised the previous act. But it seems to be settled, that acts done by an administrator de son tort, will not bind the same person as rightful executor; any more than they would bind a third person who should become administrator. (*2 Wheat. Selv.* 790-1; *1 Adol. & Ellis.* 49.) If it were otherwise it would be in the power of any creditor, combining with the widow, as in this case, though all by the act becoming administrators de son tort, to administer the goods and defraud other creditors. The only safe rule is to hold that such sale does not change the property, and that the person afterwards becoming lawful administrator, can recover it.

Verdict for plaintiff.

Houston, for plaintiff,

Cullen, for defendant.

LEWIS and ROBERT WEST, appellants *vs.* ROBERT A. HOU-
STON, respondent, plaintiff below.

Money paid through ignorance or mistake of a *fact*, may be recovered back in the action of *assumpsit*; but not where the party had full means of knowledge in his power.

APPEAL, from the judgment of a Justice of the Peace; in an action of *assumpsit*. Pleas, non-*assumpsit*, &c. Issues.

The defendants below, the Messrs. West, originally brought an action of *assumpsit* in this court, against the plaintiff below, R. A. Houston, for \$90, and recovered \$44,50. The costs in that case were \$15,15; and there was no affidavit filed to enable the plaintiffs to recover costs under sec. 37, *Dig.* 351. The costs were erroneously taxed by the prothonotary in making up the record, and the defendant in that case paid them, supposing that the plaintiffs had filed an affidavit under the above section, which would entitle them to costs. This suit was brought to recover back the costs so paid.

Cullen, for defendants, moved a nonsuit, on the ground that money paid by a person under mistake of *law*; or for want of noticing a *fact* within his knowledge or power, cannot be recovered back in this action. (2 *East. Rep.* 468; 1 *Eng. C. L. Rep.* 43; 1 *Dallas Rep.* 147; 9 *Coven* 674; 1 *Esp. N. P. C.* 84, 279; 2 *Ibid* 546; 2 *Johns. Ch. R.* 51, 60; 13 *Eng. C. L. R.* 323-5, 293; 1 *Wend. R.* 355; *Smith's Leading Cases* 174; 2 *Hall's N. Y. Rep.* 252; 3 *Wend. Rep.* 69, 72.)

Houston, contra, said that the payment was made under a mistake of fact, and could be recovered back. Most of the cases cited, arose under mistake of law. (13 *Eng. C. L. R.* 293; 1 *Leigh. N. P.* 54.) The plaintiff in this case was misled by the costs being taxed as if an affidavit had been filed. (1 *Steph. N. P.* 347-8; 2 *East. Rep.* 469.)

The Court ordered a nonsuit. Where there is a payment in ignorance or mistake of a fact, it may be recovered back, unless the mistake arises from the negligence of the party to examine and take notice of information within his full means of knowledge. Here the plaintiff was party to the very record of the judgment which he was paying, which record showed the fact he now alledges he was ignorant of.

Houston, for plaintiff below
Cullen, for defendants.

JOHN JOHNSON *vs.* MANLOVE JOHNSON.

Quere. Will replevin lie in any other case than that of an unlawful taking? Does *Hazzard vs. Burton* ante p. 62, go to that extent? At all events there must be an unlawful detention.

A purchaser, therefore, at a sheriff's sale, must demand the goods before he can maintain replevin.

A court of law will not recognize the right of a married woman to acquire property and transact business independent of her husband, though such a power is claimed under a marriage contract.

THIS was an action of replevin for a horse. The sheriff returned replevied, and delivered to plaintiff. Pleas, non cevit modo et forma; cevit in alio loco; and property in Rebecca Johnson.

The plaintiff claimed property in the horse by purchase at a sheriff's sale, on execution process at his suit against the defendant, Manlove Johnson. He proved the judgment and execution; and to prove the levy and sale, called the deputy sheriff, who proved that he sold the horse to John Johnson for \$8 at sheriff's sale: the horse was not present, but was said to be in the stable. He served the replevin, and delivered the horse to plaintiff. Manlove Johnson was not there. His wife said it was her horse. M. Johnson did not refuse to give him up, but said he was not his. No demand was made for the horse before or after the sale. M. Johnson had been in possession of the horse two or three months before the sale; and continued in possession from the sale to the replevin. He used him as his own. Rebecca Johnson, the wife of defendant, claimed all the property on the farm as her separate property.

The defence rested on the pleas of non cevit, and property in Rebecca Johnson. Evidence was offered of a marriage contract, dated 29th of March, 1838, and recorded 30th of December, 1842, between Manlove Johnson and Rebecca Poynter, which secured to each party all their property, respectively. The wife was possessed of a horse before marriage; which she exchanged, after marriage, for this horse.

Mr. Cullen contended, that the property in the horse at the time of sale was in the husband, notwithstanding the marriage contract and separate dealing of the wife.

Layton and *McFee*, contra.—There is no proof of the taking. Replevin is like the action of trespass; it supposes a tortious taking. It originated in cases of tortious taking property for rent; it has been extended to other cases, but still, cases of tort. There is no proof of this here. No demand of M. Johnson after the sale, and no act

by M. Johnson which would amount to a taking. There must be either a tortious taking, or an illegal detention, which will be equal to an unlawful caption. (1 Ch. Plead. 160; 10 Johns. Rep. 369-71; 1 *Ibid* 384-5; 7 *Ibid* 139-43; 17 *Ibid* 116; 3 Wend. R. 242; 15 Johns. Rep. 458.)

Cullen, in reply.—This point was made in the case of Hazzard *vs.* Burton, and it was there decided, that replevin would lie; on the ground that the ownership of the property drew to it the possession, and the purchaser at a sheriff's sale could bring replevin without a demand.

The Court directed a verdict for plaintiff; and entered a rule, on their own motion, to show cause why the verdict should not be set aside, and a judgment entered for the defendant on the plea of non cepit, for misdirection of the court on the question whether this action could be sustained on the proof as to the *taking*.

As to the idea of a defence under the marriage contract, and dealings with the wife, independently of the husband, in consequence of it, the court regarded such defence in a court of law, as confusing all legal ideas of the relation of husband and wife.

By marriage the separate existence of the wife, is in point of law, merged in the wife; her liabilities are his; her acts are his; and if done in his house or presence, are presumed to be done by his command. There may be rights growing out of the marriage contract, which might be enforced in a court of equity; but in a court of law, and where there are no trustees in whom the legal title to the wife's property is vested to assert that right of property, a wife cannot set up any separate claim to her husband's property, or pretend to any independent action in relation to it.

On the rule to show cause, *Mr. Layton* cited 10 Johns. Rep. 373; 12 Wend. Rep. 29; 1 Chitty's Pl. 164; 7 Johns. Rep. 140; 5 Mass. Rep. 283-4; 14 Johns. Rep. 87; 15 Mass. Rep. 156, 359; 15 Johns. Rep. 401.

Mr. Cullen referred to Hazzard *vs.* Burton, ante p. 62, to show that replevin would lie for an *unlawful detention*. That decision was a departure from the English and New York law. (15 Mass. Rep. 340; 16 *Ibid* 146-7; 3 Steph. N. P. 2636.)

By the Court:

Booth, Chief Justice.—Even if replevin would lie for an *unlawful detention*, this action could not be supported, for there was no demand, and no evidence of a conversion.

It has heretofore always been considered the law of this State, that replevin would lie only in case of an unlawful taking. We hesitated at the trial on account of the reference to Hazzard *vs.* Burton, but it appears by that case, that there was a demand and refusal to give up the goods, and therefore an unlawful detention, if not an unlawful taking from the sheriff by relation as a trespass ab initio.

Judgment for defendant.

Cullen, for plaintiff.

Layton and *McFee*, for defendant.



DANIEL CURRY and NEHEMIAH DAVIS, trading under the firm of
CURRY & DAVIS *vs.* HENRY MAY.

The court refused to nonsuit a party for an unexplained alteration of the instrument declared on, though the alteration was important, and was in plaintiffs' handwriting, and the instrument in his custody ; it appearing that the defendant had a counter-part, which he refused to show.

The question of variance between the contract declared on and proved, considered.

THIS was an action of covenant on a contract under seal, for the sale and delivery of one thousand cords of oak wood to the defendant, at four dollars and seventy cents a cord, delivered in Philadelphia. The breaches were, the nonpayment for a portion of the wood delivered under the contract, and refusal to accept the residue. The pleas were non est factum, payment, &c.

The declaration set out, that "Whereas the plaintiffs were possessed of a large quantity, to wit: one thousand cords of good merchantable oak wood, of a certain quality, to wit: such as they had theretofore chopped on the lands of a certain Caleb S. Layton, and a certain lot which they had chopped in certain woods below Cedar Creek, two hundred cords *more or less* of which said one thousand cords of wood was then and there seasoned ; the defendant afterwards by his certain writing obligatory, sealed, &c., and here shown, &c., covenanted and agreed with the plaintiffs to buy and receive of the plaintiffs the said one thousand cords of good merchantable oak wood as aforesaid, at the price of \$4 70 per cord; and to that end it was then and there agreed upon between, &c., in and by the said writing obligatory, that the plaintiffs should deliver to the said Henry May & Son, during the year 1842, at Philadelphia, the said

one thousand cords of good merchantable oak wood, that is to say, the said two hundred cords, *more or less*, of the said wood which was seasoned as aforesaid, early in the spring of the year next, &c., and the residue thereof regularly, &c. &c.; and, in consideration thereof, the defendant covenanted that May & Son would receive the wood, and find wharf for the same; and would pay \$4 70 per cord, clear, &c., and would accept and pay to the plaintiffs their drafts at sixty and ninety days for the said one thousand cords of wood; and that said May & Son would pay the purchase money for the same in three different instalments, one-third thereof on the 1st of June, one-third on the 1st of November, and one-third on the 1st of April following. And the plaintiffs relying on said contract, on, &c., at sundry times between, &c., shipped the said two hundred cords of seasoned wood, being part of the said one thousand cords of good merchantable oak wood as aforesaid, to Philadelphia, and delivered the same to May & Son; and shipped three hundred other cords, part of said one thousand cords, and delivered to said May & Son; and also shipped other large quantities of said wood, part of said one thousand cords, and tendered the same to May & Son, which they refused to receive, &c.; and that plaintiffs drew several drafts which were not accepted, or paid, &c. &c."

Plaintiffs gave in evidence the following contract; and, having proved the delivery of certain wood in Philadelphia, and the offer to deliver other wood, which defendant refused to receive, or provide wharf room for; closed their case.

"We have this day bought and engaged of Curry & Davis, one thousand cords of good merchantable oak wood, such as they have chopped on Caleb S. Layton's woods, and a certain lot which they have chopped in the woods below Cedar Creek, all to be delivered in Philadelphia this present year; there is *about* two hundred cords of this wood seasoned, and will be shipped early in the spring; the said Curry & Davis is to deliver the said wood regularly along through this season, and the said Mays is to receive and find wharf room for the wood as it is delivered to them; and the said Henry May & Son is to pay them four dollars and seventy cents, (*interlined* 'clear of wharfage or expense') for each and every cord, till the above amount is filled up; and the said Mays is to pay to Curry & Davis their drafts at sixty or ninety days. We each of us bind ourself under the penalty of \$500 for the true complying with the above contract; as witness our hands and seals this the 22d day of Jan. 1842.

The understanding is, the payments are to be made in three dif-

ferent instalments, viz: one-third the 1st of June, one-third the 1st of November, and the balance the 1st of April, 1843. Our transient or store wood is not to be included in the contract.

(Signed:) HENRY MAY. [Seal.]

Witness: JOHN P. POLK,
P. F. CAUSEY.

Layton, for defendant, moved a nonsuit, on the following grounds:

1. For an unexplained interlineation in the body of the instrument sued on of the words "clear of wharfage and expense. (*Shep. Touch. 66, ch. 4; 1 Pet. Rep. 364; 2 Phil. Ev. 88; 5 Co. Rep. 23; 1 Chit. Pl. 480; 4 Yeates' Rep. 278.*)

[Judge Milligan asked if there was a counterpart. The defendant said yes; but he was not bound to produce it.]

2. For a variance between the deed declared on, and the instrument given in evidence. 1. The declaration states a contract by Henry May: the contract itself is in the plural number "We," meaning Henry May and Jonathan May, trading under the firm of H. May & Son. 2. The contract specifies about two hundred cords of wood: the narr., has it two hundred cords, more or less. There is a manifest difference between two hundred cords *more or less*, and *about* two hundred cords. 3. The declaration states that May agreed to *accept* and pay plaintiffs' drafts: the contract is, that they shall pay the plaintiff's drafts. 4. The declaration states a contract for payment at sixty and ninety days: whereas, the contract offered is to pay by three instalments, *in June, November and April*, by drafts at sixty and ninety days. 5. The contract was for wood, such as was cut in C. S. Layton's woods: there is no averment that the wood sent was *such* wood.

If there is a material variance, advantage may be taken of it on a motion for a nonsuit, on the plea of non est factum. (*1 Saund. Pl. & Ev. 457; 9 East 188; 11 Ibid. 632.*)

Houston, contra.—1st. It does not appear that the interlineation was made after the execution of the deed. The contrary is the fact. And it is too late after the contract is admitted in evidence, to ask a nonsuit for an alteration not proved to be made after execution. The defendant has a counterpart which he refuses to show. 2d. The narr., sets out the contract by its legal effect, and there is no variance.

A majority of the court refused the nonsuit. Judge Harrington

differed on the ground that the contract as alledged was of a purchase of twelve hundred cords of wood, of which two hundred cords *more or less*, should be seasoned wood; whereas the contract was for one thousand cords of wood, of which *about* two hundred cords should be seasoned.

The plaintiffs had a verdict.

Houston, for plaintiffs.

Layton and Cullen, for defendants.



JOHN H. ELLIGOOD, defendant below vs. WILLIAM CANNON,
plaintiff below.

To sustain a judgment *by default*, the justice's record must show that he heard the *proofs* of plaintiff's claim.

It is not sufficient that he "investigates the plaintiff's demand;" he must require such proof as the nature of the case admits of.

If the suit be commenced by *summons*, the justice should allow the freeholder's stay of execution, unless oath be made, &c.

CERTIORARI to Justice Wilson.

The exceptions to the judgment in this case were:—

1. That the place of appearance was uncertain. The summons commanded the constable to "summon John H. Elligood to appear on Monday, the 29th of January inst., *at his office* at Bridgeville, before Wm. B. Wilson, one of our justices, &c. &c." 2. That judgment was rendered by the justice, by default, against the said John H. Elligood, without first having heard the allegations and *proofs* of the plaintiff. The record stated that "the defendant not appearing, the constable is sworn to the service of the aforesaid summons; and after investigating the plaintiff's demand, judgment is rendered for plaintiff for \$18 32 debt, and sixty-nine cents cost, by default, January 29, 1844." 3. That John H. Elligood was at the rendition of judgment, a *freeholder* of the county, and was treated as such by the plaintiff below, by suing out the writ of summons; and that execution was therefore irregularly issued without a stay.

By the Court.

The first exception is insufficient. The grammatical construction of the sentence would produce the uncertainty of place contended for; but the real and apparent meaning of the summons, is to appear at the office of the justice named.

The second exception is fatal. The act of assembly requires the justice, before giving judgment by default, to hear the allegations and proofs of the plaintiff; and to sustain such a judgment, this must appear either by express entry of the justice, or by other matters in the record. And this is an important matter. The justice ought to require all the proof which the nature of the case demands, whether the defendant appears or not. The default of the defendant cannot dispense with any such proof. In an action on a book account, as this is, the plaintiff's book of original entries ought to be produced and sworn to. Nothing of this kind appears by the present record. The entry is that the justice investigated the plaintiff's demand; it ought to be that he heard the allegations and proofs of the plaintiff.

The third exception also would be sufficient to set aside the execution. The plaintiff treated the defendant as a freeholder by making his first process a summons; and he was bound to give the legal stay of execution, or make oath against the defendant's freehold.

Judgment reversed.

Cullen, for plaintiff.

McFee, for defendant.



Lessee of JOB DONOVAN et al. vs. JAMES R. DONOVAN, tenant.

A devise of "all my real, and remainder of my estate," without any words of limitation, will carry the fee; if there be nothing in the will to control such a construction. The word "estate" refers to the quantity of interest, as well as the body of the land.

EJECTMENT. Case stated.

Ebenezer Warren, the elder, made his last will and testament in writing, as follows:—

"Item.—I give unto my daughter Betsey Dod, one shilling sterling, and no more of my estate. Item. I give and bequeath unto my daughter Bathsheba Donovan, four dollars, and no more of my estate. Item. I give unto my daughter Sarah Griffith, one shilling, and no more of my estate. I give and bequeath unto my son Benjamin Warren, one dollar and ten cents, and no more of my estate. Item. *I give unto my son Ebenezer Warren, all my real, and remainder of my estate.* Item. I give unto my daughter Selah Walls, one dollar and ten cents, and no more of my estate. I leave my wife Levina Warren, and Job Donovan, my whole executors of all my estate."

The question was whether Ebenezer Warren, the younger, took an estate in fee, or only a life estate, under the devise to him by the said will. If but a life estate, judgment to be entered for plaintiff; if otherwise, for the defendant.

Wootton and Layton, for plaintiff, cited, 8 *Johns. Rep.* 141, *Jackson vs. Harris*.

Houston, contra, cited, 22 *Law Lib.* 212-20, (*Povel on Devises* 212.)

The Court.—The word "estate," as used here, applies to the title as well as the corpus of the land. Ebenezer Warren takes an estate in fee. *Judgment for defendant.*

Wootton and Layton, for plaintiff.

Houston, for defendant.



LEVIN PETTIJOHN, appellant, d. b. *vs.* DANIEL HUDSON,
respondent, p b.

If one constable having an execution in his hands, deliver it to another who collects the money, the second constable is not liable to the plaintiff on his official bond; but may be sued in assumpsit for money had and received to the plaintiff's use.

Daniel Hudson, the respondent, recovered a judgment before Justice Tindal, against John Lynch, for \$21 90; and issued an execution thereon, which was delivered to constable Isaac Jefferson. Jefferson placed the execution in the hands of constable Pettijohn, who collected the money from the defendant Lynch. The execution was not returned by either.

The present action was in assumpsit against Pettijohn, for money had and received to Hudson's use. There was also a special count setting out all the facts.

Mr. Cullen, for plaintiff, contended that the action of assumpsit would lie, and cited, 1 *Wend. Rep.* 534; 9 *Johns. Rep.* 96; *Chitty Cont.* 607, 641; 2 *Johns. Rep.* 183; 2 *Saund. Pl. & Ev.* 212, [673]; 1 *Com. L. Rep.* 277; 1 *Harr. Rep.* 446; 7 *Johns. Rep.* 470; 1 *Ibid* 130; A parol promise to one for the benefit of another, will be sufficient as a ground of suit by that other.

Houston and Layton, contra, relied that assumpsit would not lie because the remedy was against the defendant on his bond, or for a breach of official duty; nor would it lie against him as the deputy

of Jefferson; nor individually, as there was no privity between him and Hudson.

The Court sustained the action. Mr. Pettijohn was not the officer to whom this execution was directed or delivered. He was not accountable on his bond, or in the summary remedy under the act of 1833, for money received under color of this execution. If he is not responsible to Hudson, under the count for money had and received, he is not liable at all, though he actually received the money for the use of Hudson, and to which he was lawfully entitled. He received the money as the agent of Jefferson, and not by any deputation.

It was proved in the case that Pettijohn forwarded to Jefferson his note for the amount which he had collected on this execution, which Jefferson refused to receive in payment, but retained as an evidence of the debt; and the defendant relied on this as discharging him from any liability to Hudson; but the court held otherwise, unless Jefferson had accepted the note in payment to him; and this before suit was brought by Hudson. Pettijohn received this money as the agent for Jefferson; it belonged to Hudson; and Hudson had his action against him for money had and received to his use, if he pursued his remedy against the agent before settlement with his principal. (1 *Selw. N. P.* 79, n.).

Judgment for plaintiff.

Cullen, for plaintiff.

Houston and *Layton*, for defendant.



NEHEMIAH REDDEN vs. JAMES P. BARKER.

The relation of landlord and tenant must have existed to support the action of assumpsit for use and occupation.

A person who enters into possession under a contract of purchase, cannot be held liable for rent; unless perhaps, when the contract of purchase is conditional, and there is an express promise to pay rent if the condition be not performed.

THIS was an action on the case for the use and occupation of a dwelling house in Georgetown. The defendant entered into possession under a contract of purchase which he failed to comply with; and the question was whether he could be held liable for rent whilst he occupied. There was some evidence offered of admissions by the defendant that he was liable for rent, or of his payment of taxes which he said he should deduct from the rent.

Cullen, for defendant.—Where one enters into the possession of land as a purchaser, he cannot be liable for rent in an action for use and occupation. There is no promise implied by the law arising from such a relation, to pay the rent. If Barker went into the possession under any contract or agreement express or implied with Redden to pay rent, he is liable in this action; but if he entered as a purchaser and owner, he is not liable for the rent though he never paid the purchase money. (2 *Selw. N. P.* 1085-79-80; 2 *Taunt. Rep.* 145; *Chit. Cont.* 370, n. 1, 371, n. 1, a; *Sugd. Vend.* 183; 13 *Jokns. Rep.* 489; 3 *Com. L. R.* 411-12; 6 *Johns. Rep.* 46; 3 *Stephen's N. P.* 2719.)

The action of use and occupation is founded on the idea of a contract for the payment of rent, and unless such a contract be proved, or such a relation of the parties exists, from which an agreement to pay rent may be implied, the action will not lie.

Houston, in reply, agreed that where the defendant enters under a contract of purchase, which fails, he is not liable for rent under any implied contract; and an express understanding in reference to the rent must be proved. But he contended that there was evidence here from which the jury could find that there was such an agreement.

Booth, *Chief Justice*, charged the jury.—The action is to recover a compensation for the use and occupation of a house and lot. It proceeds on the idea of a contract of renting, either express or implied. A contract for the payment of rent may be implied from circumstances. The relation of landlord and tenant must exist. If the defendant enter under an agreement to purchase, he is not liable for rent; for the character of purchaser excludes that of tenant; except perhaps, in a case similar to the present, where the defendant enters under a conditional contract for the purchase, and there is an express agreement to pay rent in case such purchase should not be carried out; the defendant might be liable on proof of such express agreement. If the jury think this is such a case, and the agreement is sufficiently proved, the plaintiff ought to have a verdict; otherwise, not.

Verdict for defendant.

Houston and Wootten, for plaintiff.

Cullen, for defendant.

MANAEN SHORT vs. HANNAH PIPER and ROBERT PRETTYMAN.

One entitled to the inheritance may recover in an action on the case for an injury to the inheritance by tenant in dower, *though there be an intermediate life estate.* It seems that the action differs in this respect from the action of *waste*, which must be by the person entitled to the *next immediate estate* of inheritance.

THIS was an action *on the case* by a reversioner against a tenant in dower, for an injury to the inheritance; with a count *in trover* for the value of the timber cut and carried away: (as to which see 1 Ch. Pl. 199, 201.)

It appeared in evidence that the defendant, Hannah Piper, had been in possession by metes and bounds for more than *thirty years*, occupying as tenant in dower, as the widow of Joseph Piper. There was no record or other evidence of the assignment of dower. It was further proved that Joseph Piper had sold and conveyed the reversion to a certain Josiah Piper, who conveyed to plaintiff, *reserving a life estate for his own life*, and that he was still living. The injury to the inheritance was proved as laid.

On this evidence of the plaintiff *Houston*, for defendants, moved a nonsuit. The narr., states that the defendant, Hannah Piper is tenant in dower, and that plaintiff is seized of the reversion. The proof shows that there is an intermediate life estate in Josiah Piper.

The remainderman, Manaen Short, cannot maintain an action on the case for an injury to the reversion by the first tenant for life, during the life of the second tenant for life. The action can only be brought by him who has the *immediate reversion in fee or in tail*. (1 Leigh. N. P. 585; 2 Saund. Rep. 252, n.; Co. Litt. 54; Cro. Jac. 688.) And if there be tenant for years, remainder for life, remainder in fee, the remainderman in fee cannot maintain an action for an injury to the reversion during the life of tenant for life.

2d. The plaintiff cannot recover on the last count which is in trover; because the trees severed belong to the tenant for life, Josiah Piper, and not to the remainderman.

Layton.—The authorities cited apply to the action of *waste*, and not to an action on the case for an injury to the reversion. In the latter action the reversioner is entitled, though there be an intermediate life estate. If Josiah Piper himself had committed the destruction, Manaen Short could maintain this action against him. (1 Ch. Plead. 52; 2 Saund. Rep. 252, a. and b. n. 7; 4 Burr. Rep. 2141;

7 Term Rep. 11; 3 Levinz 209, 359-60; 6 Com. Dig. Waste 515; 1 Saund. Rep. 321.)

This objection applies only to the first three counts. The fourth count is for taking and converting trees on other land as well as the dower, as to which Manaen Short is the immediate reversioner.

Houston replied.

By the Court:

Booth, Chief Justice.—The court have some doubt arising from the fact that the text books usually state this action, as the action of waste, as competent only to the next immediate reversioner or remainderman. But we cannot at present see the reason of so confining it. The reversioner has an interest in the property injured; the wrong is to him more than to the remainderman for life; and the principle of law is, that wherever there is a right there ought to be a remedy: and we know of no remedy for the reversioner in fee, unless he can have it in this action.

We presume the expression in the books, that this action may be maintained by the person who has the *immediate* reversion, or remainder, arises from the fact that the action of waste, being given by statute, is so confined; and one reason for this is, that in that action the place wasted is recovered, and the action is necessarily by the person next entitled. It is probable that the same expression has been continued, without the same reason, in application to the action on the case in the nature of waste.

As at present advised we refuse the nonsuit; and will hear the matter re-argued if requested. Indeed, we could not nonsuit the plaintiff, if we thought otherwise on this question; as the fourth count is general, in trover for the value of the timber, &c., severed from the land.

Verdict for plaintiff.

Layton, for plaintiff.

Houston, for defendants.

Doe on the demise of DANIEL RODNEY *vs.* Roe, and JOSHUA S. BURTON.

R. having a married daughter (Mary) and several grand children, devised his estate to his brothers, in *trust* to divide it equitably agreeable to the laws of the State; but that his daughter *Mary* should receive no part of it whilst married to her then husband; nor her *minor* children; and in case of their death under age, that their share should "descend to the trustees, their heirs and assigns forever;" and in case *all* his *children* and *grand children* should die without leaving lawful issue, then the estate should go to the trustees, their heirs and assigns in *fee*, and *clear of any limitation or trust*. Held, that the brothers took no estate discharged of the trust, while there were children of the testator born after the will, though his daughter *Mary* and her children died without issue, and before any of her children attained full age.

THIS was an action of ejectment for fourteen acres of land, in Lewes and Rehoboth hundred, of which Thomas Rodney died seized.

Thomas Rodney, by his will, dated in 1817, devised to his brothers Daniel, Caleb and John Rodney, all his estate, real and personal, to them or the survivors of them, in *trust* and special confidence that they should, immediately after his decease, make such division and disposition of the same as to a majority of them should seem equitable and right, agreeable to the laws of this State; subject to the two following exceptions and condition: 1st. That his daughter, Mary, while she continued under coverture or married to her then husband, William Robinson, should receive no part of his estate, and in case she should die before her aforesaid husband and leave issue by him, that the said trustees should hold that part of his estate, that his said daughter might be lawfully entitled to, for the said issue until he, she or they, might arrive at lawful age to receive it; but should such issue die before they came to lawful age, then that what they might be lawfully entitled to should descend to the said trustees, their heirs and assigns forever: and 2d., in case *all* his *children* and *grand children* should happen to die without leaving lawful issue, then that all his estate, both real and personal, should go to the aforesaid trustees, to them, their heirs or assigns in *fee*, and *clear of any limitation or trust* whatever."

Thomas Rodney at the date of said will had but one child, Mary Robinson, and several grand children, her issue. He married again in about one month after the date of the will, had issue, Ruth (defendant's wife,) and died. William Robinson died in August, 1825, when Mary Robinson, by permission of the trustees, went into possession of the premises in question, with other land of the said Thomas Rodney, and continued in possession until 1835, when she died

without issue. For several years after her death, the possession of the premises was doubtful; but had never been in the trustees under the will. About three years ago the defendant took possession as the husband of Ruth Rodney.

The plaintiff claimed title as the surviving trustee, under the will of Thomas Rodney.

The defendant resisted the claim on the following grounds:—1st. That the legal estate in the premises was by implication devised to Mary Robinson on the death of her husband. (6 *Cruise Dig.* 122.) 2d. That the purposes of the trust being answered at the death of William Robinson, and Mary Robinson put in possession, the court would direct the jury to presume a conveyance to her of the legal title. (*Fletcher on trust estates* 19, [50]; *Willis trusts* 92, 58, [124, n.];] *Leigh N. P.* 851-2; 8 *C. L. Rep.* 92; 5 *East* 162; 1 *Barn. & Ald.* 530; 2 *T. Rep.* 682; 4 *Ibid* 682.) 3d. That defendant being in possession by the act of Daniel Rodncy, and being, as a cestui que trust in possession, a tenant at will to the trustee, could not be turned out without notice of the termination of that will. (*Willis Trusts* 39, 40, [85].)

Houston, for plaintiff.—There is enough on the proof to show that the testator made his will in contemplation of a second marriage. He meant to secure the land to the children of his daughter, Mary Robinson, subject to a condition, that her husband should derive no benefit from it; and that her children by him should not take till they arrived at full age. He directs the trustees to divide it between M. Robinson's issue, and in case of the death of such issue under age, that it should descend to the trustees in fee; and if all her children and grand children should die, then all should go to the trustees in fee. If M. Robinson's children should live to twenty-one, they were to take as the cestui que trust under the will; if she survived her husband she was to take an estate for life by implication; if she died, her share was to be given up to them at twenty-one, being the portion the law would allow them.

Mary Robinson was entitled to no more than an estate tail on her husband's death; and she died without issue. The estate tail was spent, and the plaintiff is entitled under the will as the surviving trustee, discharged of the trust.

The defendant does not claim under Mary Robinson, and is not entitled to her share of the estate. He claims as the husband of Ruth, a child of Thomas Rodncy, born after the date of the will, and under the second clause of the will, which gives *all* the estate to the

trustees on failure of *children* or grand children of the testator, or the issue of such.

Cullen, for defendant.—1. The subsequent marriage and birth of a child is a revocation of the will. (1 *Doug. Rep.* 31; 4 *Barb. & Har. Dig.* 721; 2 *Stark. Ev.* 1287, 1615; 6 *Cruise Dig.* 82, 114.)

2. The defendant is in possession by the act of Daniel Rodney, the trustee, who put Mary Robinson in possession after the death of her husband, and the defendant came into possession under her. A cestui que trust in possession is a tenant at will to the trustee, and cannot be turned out without notice. (*Adams Eject.* 104; *Willis on Trustees* 39, 40, 85.)

3. On the construction of the will. An heir at law is not to be disinherited unless by express words. The intention of the testator is to govern in the construction; and the situation and circumstances of the testator. (6 *Cruise Dig.* 122-3, [172,] 5 *Pick. Rep.* 528; *Mass. Dig.* 738.)

This will shows anger against Wm. Robinson, the son in law of Thos. Rodney. He meant not to injure his daughter and only child, but to exclude the son in law. How was he to effect this? He devised to his brothers in trust, to divide the property agreeably to the laws of the State; subject to these exceptions and condition:

1. That M. R. whilst the wife of Wm. R., should receive no part of his estate: if she should die before her said husband, having issue by him, the trustees were to hold her share for the issue until they should arrive at lawful age; if such issue should die before age, then to the trustees beneficially: but that case did not happen; he died first, she died without issue. The executory devise then to the brothers was on a contingency which never happened, and there was nothing for the trustees to take beneficially.

The second condition was in case *all his children and grand children* should die without lawful issue, he gave it to the trustees. He meant to punish the son in law by keeping him out of the property so long as he lived; for that purpose he devised it to the trustees to keep it from the wife whilst her husband lived; to keep it from her children by him whilst minors, for if they took it as minors, the father would get it: when they came of age these children were to have it all, or their mother's share; and if *all his children and grand children* should die without issue, he gave it *all* to the trustees. But Thos. Rodney left another child by a subsequent marriage, which was in contemplation when the will was made. Was it his intention that these trustees should take any part of his land in preference to his

own child? Mary Robinson survived her husband; the trustees gave the estate up to her; she occupied it for ten years and died leaving no issue; having devised it. Ruth, the child of Thos. Rodney claims, and the question is whether T. R., meant to give the land to his brothers, in preference to his own child.

The trustees ought not to recover because they, having surrendered to M. Robinson, a conveyance of the legal estate to her will be presumed. A court of equity would have compelled them to do it, and they will be presumed to have done it. (*1 Cruise Dig.* 332-3, 48-9; *13 Johns. Rep.* 513; *4 T. Rep.* 682; *2 Ibid* 684.)

The purposes of the trust being answered at the death of the husband of Mary Robinson; or at furthest, on her death without issue; the trust ceased, and the legal estate became vested in the only child of the testator under the devise to *children*. (*Fletcher on Trustees' estates* 19, 50.)

Houston, in reply.—1. Marriage and birth of a child revokes only in cases where no provision is made for such child. Our act of assembly provides for the wife and subsequent child.

2. The intention of the testator was, that the share left to M. R., should, on the failure of her issue, go to his brothers, the trustees; and not to the testator's other children, if he should have any.

3. The doctrine of disinheriting the heir by implication does not apply, for these trustees, if they take at all, take by the express words of the will.

4. As to the estate which trustees will take: the claim here is not in character of trustees, for the purposes of a trust; but as devisees, clear of any trust.

5. No presumption of a surrender of the estate can be made in this case. That principle applies only to cases of actions by the *cestuis que* trust against third persons, who set up the legal estate to defeat the action. It does not apply to actions between the trustee and *cestui que* trust. There is no proof that the defendant came into possession under Mary Robinson, and he did not take possession until after her estate ceased.

The case was now turned into a special verdict finding the facts before mentioned; upon which the *Court* gave judgment for the defendant, resting their judgment mainly upon the intention manifested on the will. It shows that the main object of the testator was to prevent his son in law, Wm. Robinson, from having any portion or share of his estate. For this purpose he placed it in trust, and provided for several contingencies in reference to the trust, and for

one final contingency upon which it was to be so determined as to give the trustees the estate free and clear from the trust, and make them beneficially interested in it. That contingency was the death of all the testator's children and grand children, without issue, which did not happen. The settled rule is, that the intention must prevail; and the court thought the intention was here manifest, that the testator did not mean to give any portion of his estate to the trustees whilst he had children or grand children, or their issue living. There was good reason for continuing the legal estate in the trustees on the failure of issue of Mary Robinson, for that might have happened in the lifetime of Wm. Robinson, which would have given him a life estate without such provision, and this would have defeated the main, if not the sole, object of the will.

The case was afterwards taken to the Court of Appeals where this judgment was, after argument, affirmed by that court, on the same grounds.

Houston, for plaintiff.

Cullen, for defendant.



ISAAC SOLOMON, d. b., appellant vs. WILLIAM LOPER and HENRY LINGO, respondents, p. b.

A judgment recovered is, whilst subsisting, conclusive as to the amount of the plaintiff's claim; though a clear mistake could be shown, arising even from the defendant's fault.

KENT, October Term, 1844. This was an appeal from the judgment of a Justice of the Peace, in an action of assumpsit. Pleas, non-assumpsit, &c.

It appeared in proof that the respondents sold a small vessel to Solomon for \$125, and placed his note for that amount in the hands of an attorney, for collection. He brought suit, and afterwards mislaid the note. The defendant came to the attorney, and said the note was for \$100, upon which a judgment was confessed for that sum, and the money paid. The note was afterwards found; and the defendant promised to rectify the mistake. This suit was brought for the difference.

The attorney was objected to as a competent witness on account of his liability over to his clients. But the court decided that the

objection was to his credit, and not to his competency. It assumes that he is interested in this question, and not in the event of the suit. The judgment in this case could not be given in evidence in a suit against him. It was also objected that, on the pleadings, he could not prove such a promise.

Bates, jr.—The action is in assumpsit for goods sold, &c.,—the common counts. There is no count on a special promise. If it is for the price of the vessel, that matter has already passed into judgment. No one can pretend that this matter is not shut up by the judgment. The suit then is for something else—for \$25; which the defendant made a special promise to pay in consideration of a supposed error in the settlement of a former suit. Now it would not be difficult to show that there was no consideration for such a promise, but the question at present is whether such a promise is admissible in an action of assumpsit on the common counts, for goods sold and delivered. There is no count giving us notice of any such promise, and no issue under which it can be given in evidence.

Huffington.—No man shall take advantage of his own wrong. The judgment in the former suit was entered by mistake caused by the misrepresentation of the defendant. It was taken for \$25 less than was due. I propose now to prove that he admitted this, and promised to pay it. How could I prove this on a special count without reference to the previous claim for the vessel sold and delivered? I should have to show this as a consideration. I consider this promise as equivalent to the statement of an account between the parties, and an admission of a sum due, and there is a count on an account stated.

The Court.—It appears that in reference to the subject matter of this suit there has been a judgment confessed; and the effort is to recover more on the assumption of a mistake in the original judgment; and a special promise by the defendant to pay any further amount which might be proved to be due. Such evidence cannot be admitted under any count in this declaration, which has reference altogether to the original demand for the price of the vessel, and which matter now appears to have passed into judgment.

Evidence ruled out and plaintiff nonsuited.

Bates and Bates, jr., for appellant.

Huffington, for respondents.

AMELIA COOK, Assignee of N. CLARK, Sheriff vs. I. T. COOPER.

On a judgment confessed, "amount to be ascertained by prothonotary," and no amount ascertained for fourteen years; the court refused to make an order for ascertaining the amount against the defendant, who was a surety, and both plaintiff and principal in the original action, being dead.

RULE to show cause, &c.

At the last term, *Mr. Bates*, for the administrator of Mrs. Cook, moved the court for an order on the prothonotary to ascertain the amount of a judgment rendered against I. T. Cooper, on the 24th of November, 1830. There were two suits brought to November term, 1829, and docketted as actions of *debt*, by Amelia Cook, as *assignee* of N. Clark, *sheriff*, against R. J. Cooper and I. T. Cooper, severally. There was an appearance in each case, and judgment by confession, at the November term, 1830; "amount to be ascertained by the prothonotary, with stay of execution for five months." The amount of this judgment had never been ascertained. Both the plaintiff and the defendant, R. J. Cooper, were dead.

Mr. Fisher, for the defendant, I. T. Cooper, who he alledged was merely the special bail of the other defendant, objected to the order.

1. The authority of the prothonotary to ascertain the amount of a judgment, must of necessity have some limitation. A neglect of fourteen years to ascertain an amount; until both plaintiff and defendant are dead, and all the matters of defence forgotten, is such laches as ought not to be aided, and an application now to ascertain the amount as against a surety, will not be entertained.

2. There are no legal parties to the suit; both plaintiff and defendant are dead.

3. These were actions on a bail bond against principal and bail, and the amount of the judgment cannot be ascertained against the surety, until it is ascertained against the principal; and cannot be recovered against either, until judgment is recovered against the principal in the original action.

4. The constitution authorizes the continuing of a suit by suggestion of death, but this must be done at the next term. There is now no power by mere suggestion to make proper parties in these causes.

Mr. Bates replied, that this was not the case of an attempt to continue a suit pending, after the death of a party, with a view to obtain a judgment; but it was the application of a party who has a judg-

ment, for an order on the officer of the court to execute the original order made on him.

The Court laid the rule to show cause; which was afterwards, on full hearing, *discharged*; the court refusing to permit the amount of the judgment to be ascertained in a summary way after so great a lapse of time.

Bates, for the rule.

Fisher and Frame, contra.



RICHARD B. GILPIN vs. SAMUEL TEMPLE, who with JAMES THOMAS, were lately trading as THOMAS & TEMPLE.

What is a partnership? This is a question of law.

In an action by third persons, the partnership may be inferred from circumstances. Even common reputation is evidence, if it be shown to arise from the acts of the partner sought to be charged.

But the acts nor declarations of one partner are not evidence of the partnership to charge another.

NEW CASTLE, November Term, 1844. This was an action of assumpsit, instituted against Samuel Temple and a certain James Thomas, as partners in the blacksmithing business, under the style of Thomas & Temple. James Thomas was not taken. The pleas were non-assumpsit, payment, discount, and set off.

The plaintiff's claim was for iron and other materials sold and delivered. The iron was ordered by Thomas and charged to the firm of Thomas and Temple. A clerk in plaintiff's store proved that Temple had been at plaintiff's store in company with Thomas, and had spoken with the plaintiff about the blacksmithing business which they were carrying on.

Question. Were they generally considered and known in the neighborhood as partners? Objected to.

Wales.—The relation of partners can only exist by a contract, and can be made known only by their acts or declarations. (2 *Saund. Pl. and Ev.* 710.)

Johnson.—The evidence of a partnership as between partners is much more strict than in relation to third persons. A third person dealing with the firm is not bound to show a contract of partnership; all he is bound to show is that the parties held themselves out to the public as partners. And for this purpose common reputation is sufficient; with corroborating circumstances. (14 *Johns. Rep.* 215.)

Clayton.—The distinction is clear between cases where the partners themselves are seeking to establish the partnership, and cases where third persons seek to charge persons as partners. In the latter case it would not be reasonable to require the same strictness of proof as in the former. Any thing which reasonably affords evidence to the public of the existence of a partnership is sufficient. (*Story on Part.* 82, 96.) Evidence of a partnership may arise from the declarations of the parties, or other circumstances, that they so held themselves out to the public. The Supreme Court of New York, after argument, held that general reputation in the neighborhood is one of those circumstances competent to be given in evidence in proof of the partnership.

Wales.—I do not contend that there must be an express contract of partnership proved. I agree that if the defendant has held himself out to the public as a partner, or done any acts to give Thomas credit on the partnership account, that these would charge him. But these acts must be proved, and not merely public rumor or opinion as distinct from the acts. The defendant here lived in the country; had nothing to do with Thomas' business, which was in Wilmington. The authority from Story only refers to the acts and declarations of the party *to be charged*; the attempt here is to give in evidence the reputation in the neighborhood, which of course, must arise from the acts of the other partners. The solitary case produced is a decision in New York, in 1817; and in that case there was proof of *acts* of the party sought to be charged, as well as the reputation.

By the Court:

The inclination of our minds is against the admissibility of this evidence. It is nothing more than hearsay evidence, which is admissible only in cases of pedigree, &c. &c. General reputation of a partnership might arise from the declarations of Thomas, unknown to Temple, and which ought not to charge Temple; and yet, after proof of acts or declarations of Temple himself, giving out to the public the idea of a partnership, it would seem reasonable that such evidence of reputation should be admitted. Such is the decision of the Supreme Court of New York, on the authority of which we shall admit the evidence, but shall expressly state to the jury that if this reputation is not proved to have originated with, or be founded on, the acts or declarations of this defendant, Temple, it is not to be considered by them in proof of the partnership.

The case turned on this question exclusively, as to which the court charged :—

BOOTH, *Chief Justice*.—The right of the plaintiff to recover depends upon the fact whether there was a partnership existing between this defendant and James Thomas. This is the only question in the cause. What constitutes a partnership is a question of law. Whether a partnership exists is a question of fact. Where the suit is between parties as partners, strict proof is required of the existence of the partnership; of the community in profits and losses; and of the contract itself of partnership. But the case is very different where the suit is by a third person against persons who are sought to be charged as partners. In such case, all those circumstances from which the existence of a partnership may be fairly and reasonably inferred, are properly to be taken into consideration by a jury. Hence, if there is sufficient proof that the defendant by his acts and declarations has admitted or acknowledged himself to be a co-partner, or that he has dealt with others as a member of the firm, or represented himself as a partner, and was trusted as such in consequence of such representations—all these are circumstances from which a partnership may be inferred. So also where it is clearly shown that the parties have held themselves out to the world as partners, or have jointly participated in the profits of the concern in respect to which the action is brought, a partnership may be inferred. And even where, in point of fact a partnership did not exist, but the parties have held themselves out to the world as partners, and thus gained a credit as such, each one is liable as a partner to third persons trusting or confiding in them as such. But the acts or admissions of only one of the persons alledged to be a member of the firm, are no evidence to establish a partnership against the defendant, who is sought to be charged as a partner. Therefore, the acts or admissions of James Thomas are no evidence against this defendant; and no act done by third persons which affects to treat the parties as partners, is evidence against the person charged as a partner, unless such act has been recognized by him. The plaintiff's books of account are no evidence to establish a partnership. Nor is the pass-book spoken of any evidence for that purpose, unless the jury have proof that it was acknowledged or recognized by the defendant.

The defendant had a verdict.

Johnson and Clayton, for plaintiff.

Wales, for defendant.

JOSEPH V. ECCLES *vs* ABRAHAM P. SHANNON.

Words spoken in the course of a judicial proceeding, without malice, are not actionable, though false and injurious.

So judicial investigations into supposed criminal offences are privileged, though they involve charges which would otherwise be slanderous.

A charge of *perjury* is actionable per se.

This was an action on the case for words, imputing to the plaintiff the crime of *perjury*. The plea was, not guilty.

The declaration set out the slander in several forms, to wit:—1st count: “That Joseph V. Eccles was a perjured man.” 2. That “he had perjured himself.” 3. That “he had perjured himself, and that I, the defendant, had persons there ready to prove the fact.” 4. “I, the defendant, am going to prove that Joseph V. Eccles had perjured himself.” 5. “I am going in to New Castle to prove Joseph V. Eccles a perjured man.” The damages were laid at \$2,000.

Wm. Gray, for plaintiff, offered in evidence the record of an indictment, *The State vs. Abraham P. Shannon*, for taking an illegal vote in which Eccles was sworn as a witness, and in reference to which the slander was spoken.

Mr. Rogers objected; that there was no averment of the matter in relation to which the charge was made, and that the evidence offered was therefore inadmissible. (*Stark. Sland.* 293-4.)

Gray.—The words laid are words actionable in themselves—a charge of *perjury*. It is not necessary to aver that the words used were in reference to any judicial proceeding. Where the words are doubtful in themselves, and only actionable as referred to other matters, those matters must be averred and proved; but where the words are actionable per se, no other matter need be averred.

Clayton.—To charge a man with *perjury* is actionable; so to charge him with being a thief; but to charge him with being *forsworn* is not actionable, without averring that the matter in relation to which he is charged with being *forsworn*, was a false swearing in a judicial proceeding. No such averment was necessary in this case, and none is made. But the record is relevant for the purpose of resisting any defence or idea which might be set up on the other side, in explanation of the charge of *perjury*, that it was made in reference to a matter not of legal or judicial swearing.

Rogers, in reply.—It is of the very essence of *perjury* that it must have been in reference to a judicial proceeding; and all that is ne-

cessary to make a case of perjury must be averred. The distinction between perjured and forsworn, is an ingenious sophistry. If the force of the term "perjured" is sufficient to make out a case of actionable slander, and it therefore need not be averred, it would have equal force on the proof, and no judicial proceeding need be proved.

The Court.—The record of an indictment against Shannon in the trial of which Eccles was examined as a witness is offered in evidence and objected to, on the ground that there is no averment of a colloquium in reference to a judicial proceeding. The charge of perjury is a charge of matter actionable in itself, and needs no reference to other matters to make it actionable. If it were a charge doubtful in its character, and actionable only by reference to other matters, those matters must be averred in order to be proved. But the charge of perjury implies in itself the charge of swearing falsely in a judicial proceeding; and the case may be sustained without averring any such proceeding. Even if averred, it need not be proved. It may be proved, however, not as entering into the substance of the charge, but as a part of the accompanying circumstances under which the slander was uttered, and as going to aggravate or extenuate it. If these matters were excluded as supererogatory because the slander is proved without them, the same objection might be made to any other evidence after proof of the uttering the words, and all the circumstances of manner or meaning connected with the charge.

The record was admitted, and showed that the defendant had been indicted for a misdemeanor, and that on his trial the plaintiff was examined as a witness for the prosecution.

In the argument to the jury the defendant's counsel contended, 1st. That the case was not proved. 2d. That the use of the words was excused by the circumstances in which they were uttered; being spoken of a witness in a pending trial, whose testimony was about to be discredited. Good policy requires freedom of speech in reference to pending trials, otherwise the truth will be suppressed for fear of the consequences. Any thing stated on such occasion, without malice, is a privileged communication. Any declaration made pending a judicial proceeding, the object of which is to defend the party in such proceeding, is to be excused from necessity and policy. (*Stark. Sland.* 172, 191-2.) No action will lie for any thing said in the course of judicial proceeding. (3 *Steph. N. P.* 2551, 65, 72; 39 *Eng. Com. Law Rep.* 115.) Bona fide charges of actionable words are justifiable, if made in the course of an inquiry into a crime.

The plaintiff's counsel on the contrary argued, that four of the five counts were proved. 2d. As to privileged communications. A man on trial, or who has a cause in court, has a right to make all necessary investigations for evidence and defence, but he must do this without malice; and only in such manner as is necessary for his purpose.

The charge here was made publicly; to all persons; repeated; not to the witnesses who were to prove it; to Doughton, who was no witness; to Whiteman, to Wolfe, and to Foster, a juryman; after the cause was concluded. Whether this sustains any count in the declaration or not, it is evidence of malice. (*2 Stark. Evid. 868-9, n.; Stark. Sland. 309.*) 3d. The charge of a perjury is actionable in itself, without reference to any circumstances, extraneous. (*Stark. Sland. 47, n. 1.*)

BOOTH, *Chief Justice*, charged the jury.

After stating the action, and the pleadings, the Chief Justice said: The plaintiff must prove the allegations in some one of the counts. To sustain the action the words must contain an express imputation of a punishable crime. The words laid impute the crime of perjury, and are actionable in themselves. Are they, or any of them proved? Considerable nicety of proof is requisite. The words must be proved in the manner as laid; not all of them, but only such as are material to show a charge of crime. It was once held that the precise words must be proved as laid; it is now settled that it is sufficient to prove the substance, but they must be proved in the same manner as charged; for example, interrogative words will not support declarative, &c. &c. Words in the present tense do not prove a slander uttered in the past tense, &c. &c.

The defendant's counsel contends that no count is proved but the fifth, which he admits was proved by Doughton. From our notes of the testimony, it would appear that with regard to the first and second counts, there is a variance between the proof and averments. Mahlon Foster proves that Shannon said "Gentlemen, it is my opinion that Jos. V. Eccles is a perjured man;" which we think does not prove the first count, which states a direct and positive charge of perjury. We think then that neither the first count nor any other count is sustained by Foster's testimony. But at the same time we say, that if the slander as laid in any of the counts is proved by other witnesses, then the declaration to Foster, with the time, place and circumstances, under which it was made, are proper for consideration as evidence of malice on the question of the amount of

damages. Whiteman's testimony proves the fourth count. But it is alledged by the defendant's counsel, that the proof does not sustain the charge, because Whiteman does not state the connection between the slander as uttered, and the case then pending against Shannon. We are bound to tell you that in our opinion such connection is, in this case, not necessary to be proved, because the charge is in itself a charge of a felony. Doughton proves the fifth count, word for word. We speak of the proof in all these cases merely as matters deposed to. The jury are to judge of the credit of this and all the witnesses, and say if they are to be believed, not merely on their general veracity, but in reference to their opportunity and means of knowing what they depose to; and to the probable effect on their testimony of passion, prejudice, or bias from any cause, if any such exists. It is the duty of a jury to weigh the testimony. A conflict of testimony does not necessarily establish falsehood on the part of any of the witnesses. It is to be reconciled if possible; if not, the most credible is to be taken, and the other rejected.

2. But the defendant, supposing that the words were spoken, takes the ground that they were spoken on a justifiable occasion; and that it is a privileged communication: that it was made in the course of a judicial proceeding, in his own defence; and though irregular, still protected by the necessity of the case. The principle is correct; the question is, whether it applies?

Words spoken in the course of a judicial proceeding, bona fide, and without malice, although false, and in themselves actionable, and although an injury in consequence of them has resulted to the plaintiff, are privileged. Where a man erroneously charges another before a magistrate, with a criminal offence, if done honestly and without malice, he is protected. If a party prosecute an injury into a suspected crime, it is privileged. But in all these cases, the acts and declarations protected, must be such as are done or said in the course of such defence or proceeding, and necessary to it. If he step beyond this, he is not justified or excused. If necessary, he may endeavor to discredit the witnesses, or to prove them guilty of perjury, and, he may inquire of others with a view to collect testimony for this purpose; but he is not authorized to charge them with perjury wantonly or needlessly, or to proclaim it in the public streets. The amount of damages is a question entirely for the jury.

The true measure of damages in an action of slander is the injury sustained by the party. But malice may aggravate and enhance them. Malice is of two kinds, legal and express, or implied malice,

and express malice. Implied malice is where the charge is made intentionally, without lawful or just excuse. The law presumes malice in every case of a charge of a punishable crime, and the plaintiff is entitled to recover; and, if express malice be proved, that is, that the defendant slandered the plaintiff with the intention of injuring him, the jury may give exemplary damages.

Verdict for plaintiff—damages \$650.

Gray and Clayton, for plaintiff.

W. H. Rogers, for defendant.



GARRETT & SMYTH vs. SAMUEL BAILEY.

The act of 1773, for the encouragement of mill owners, and giving them a summary remedy for damages occasioned by the erection of other dams, has reference to the location of new mill seats; and does not apply to a change in the construction of dams already erected.

In the matter of the petition of Garrett & Smyth, for a jury of view, under the act of 1773, *Dig.* 404, in relation to mill property; to assess damages done to previous mill owners by the erection of a dam by Samuel Bailey, within six years last past.

Petition presented by *Mr. Wales*, and motion that a writ be issued for this purpose to the sheriff of New Castle county.

Rogers, jr., for Samuel Bailey, the mill owner below, asked to be permitted to traverse the facts in the petition: particularly the time of erecting the dam, which he alledged was more than six years ago.

Wales.—The application for the writ is *ex parte*: only preliminary. The law requires no notice to the mill owners; makes no provision for hearing them at this stage of the case; much less to go into evidence before the court, on the material facts to become the subject of dispute before the jury. The court might as well be asked to try a question of limitation, or other question in a cause commenced by summons, or capias, before the issuing of the writ. It is a matter of common right.

Rogers, jr..—It is one of the anomalies of this anomalous proceeding that this matter of common right has to be asked for by petition, and granted by an order of court specially made for the purpose. That the party who is to be affected by this strange proceeding, under an obsolete law, shall not have the right to defend himself. There is no more provision for his defence at any subsequent stage

of the case than at this, and I suppose we are to hear at every stage of the case, that there is no right to appear in court and make defence. I maintain that in every case coming before this court by petition, the party petitioned against has the right to be heard before any step is taken against him.

The act was obviously designed to apply to the erection of *new* dams, and this remedy is limited to six years after the injury. The dam to which it is now sought to be applied is seventy-two years old, and has stood there without alteration for that length of time. And that dam and the water kept up by it, purchased of those under whom the petitioners claim. This is a case of want of jurisdiction, if the matter embraced by it be not within six years. This is a preliminary to the ordering the writ in pursuance of the petition.

Wales.—All that the court has to look at in this stage of the proceeding, is to see that the petition states such facts as bring the case within the act. The facts of the petition nor any other matter cannot now be controverted. Hereafter the party now appearing, or any other interested, may appear and make any defence he can sustain.

The Court.—This is a remedy specially provided by act of assembly, and the party resorting to it must bring himself within its terms. He must show the court by his petition, and if these preliminary facts be denied, by proof, that the dam of which he complains was erected within six years. This is a restriction imposed by the law itself. The grant of this writ is not of course, neither is this proceeding *ex parte*. The petition states that a dam has been erected within six years, to the damage of the petitioner. He ought to prove this at least *prima facie*, to show that the court ought to entertain jurisdiction.

The petitioners then proved that Samuel Bailey had put an upper piece on his mill-dam, from four to six inches thick ; and that from this or from some other cause, the water had been more backed on the upper mills than formerly.

Rogers, jr., for S. Bailey, asked leave to examine witnesses to rebut the testimony of the witnesses adduced by the petitioner, which the court declined to hear at present ; and *Clayton*, for the petitioners, moved to amend the petition, by inserting a complaint of injury by increasing and adding to the mill-dam.

Rogers, jr.—This court has no jurisdiction of the subject matter of this application. The law of 1773, gives the jurisdiction to the

"County Court of Common Pleas," under the administration of the Hon. Pat. Gordon, colonial governor. This court was abolished by the constitution of 1792, and no transfer of its jurisdiction to any other court. A new court was established called the "Court of Common Pleas," which court is abolished by the constitution of 1832, and the "Superior Court" established in its stead ; and the jurisdiction transferred to this court. The act of 1832, directs that wherever the words "Court of Common Pleas" occur in any acts of assembly, they shall be stricken out, and the words "Superior Court," substituted. This court, has therefore, no jurisdiction of the matters provided for by the act of 1773.

2d. But the case now presented is not a case that would come under that law if the court had jurisdiction. It was a law to discourage the making more mills and the erection of more new dams, and has reference only to such erections. It does so in terms, and from its object. Can it be said that a law giving a summary remedy for the erection of new mill-dams, shall be applied to damages done by a small increase in the size of an old dam which has been in the peaceable occupation of the defendant for seventy years and upwards, and all the time used as a mill. There is no proof of making a dam within six years ; and no proof of even an increase of the dam within that time.

Wales and Clayton.—This act is a *beneficial* statute. It is entitled "An act for the *encouragement* of mill owners, &c." It was designed to protect upper mill owners against lower mill owners backing water upon them. As such beneficial statute it is entitled to a *liberal* construction in furtherance of the object and advancement of the remedy. The act provides for no notice to any person; Samuel Bailey has no right to appear and make any defence to the issuing the writ. Unless secured by law he has no such right. What is our petition ? We assume that we have a right to amend it under the constitutional provision, at any time *pending* a cause ; and this case is hardly yet commenced. As amended, it sets out as the grievance that the complainants have been injured by an addition to the respondent's mill-dam. There is *prima facie* proof of this. Such proof as the court would require as preliminary to the issuing of the writ. The jurisdiction of the "County Court of Common Pleas," was transferred to the Court of Common Pleas, and and that to this court.

Rogers, in reply.—The act so far from being such as is to be construed liberally, falls within that class of statutes which are to be

construed most strictly. It provides a new mode of trial; not known to the common law; and a new and highly penal mode of judgment, which may extend to the pulling down and abating the respondent's mill-dam. The act in its terms and plain meaning has reference to mill-dams newly planted; originally made; and not to additions to old and established mill-dams. The want of jurisdiction is not answered by authority; only by statement and assertion by one counsel; and attempted ridicule by the other. The County Court of Common Pleas was a court of county jurisdiction. The Court of Common Pleas was a court of general jurisdiction. Amend the law as they require, according to the act of 1832, and the jurisdiction would be in the "County Superior Court:" there being no such court.

Court.—From the meaning of this act of assembly of 1773, taken in connection with the previous acts, it was evidently intended to apply to mill-dams recently erected, or made for the first time to the injury of previous mill owners; and was never intended to apply to the rights of ancient mill-holders backing water by the raising mill-dams already erected. The act is in derogation of the common law, and must receive a strict construction. In its terms it applies to the erection of new dams, and it repeals previous laws for facilitating the erection of such dams. Many cases have occurred in the State for violating mill rights by backing water; some of which have been conducted and defended^a by the ablest counsel in the State, and no resort has heretofore been made to this mode of remedy. Considering the complainants' petition as amended, therefore, it states a case, in our opinion, not within the law; as it stood it is not supported by any proof whatever of the erection of a dam by the respondent, within six years. In either case the petition must be dismissed.

Petition dismissed.

Wales and Clayton, for petitioners.

Rogers, jr., contra.

RUTH UNDERWOOD, Assignee of ISAAC PYLE *vs.* ABEL JEANS.

On a sale of real estate by the sheriff, he must be prepared to prove at least one advertisement posted in each hundred, ten days before the sale.
It seems that this is not exclusive of both days.

LEvari Facias. The sheriff returns sold—No. 1, to Beeson and Tweed for \$9,025: No. 2, to J. Whiteman for \$385: No. 3, to James Woods for \$1.

Rule to show cause why the sale should not be set aside, on the affidavit of Abel Jeans, the defendant, that no notice of the sale was given to him; 2d., that due notice was not given to the public, inasmuch as no notice was published in the newspapers, and no statement in the advertisements of the lime-quarry, which was on the premises; and 3d., that there was a public impression that the bidding was for defendant, and the property was sacrificed in consequence of that impression.

The defendant produced some evidence that there was a report at the sale that the purchasers of No. 1 were bidding for him, and the property sold for less than its value, in the opinion of some of the witnesses. It did not appear that this report originated with the purchasers, or the creditors; indeed, it was charged on the defendant himself.

On the subject of notice the question arose whether the plaintiff or purchaser were bound to prove the notices without any evidence contra; and the court said the defendant must lay a *prima facie* case in support of his affidavit of the want of regular notice, to call on the other side for proof of notice; though slight evidence would be sufficient for this purpose.

The defendant then called the innkeepers of two of the principal inns in Pencader and Red Lion hundreds, where such advertisements were usually posted, and who had not seen any advertisement of this sale.

The Court considered this sufficient *prima facie* evidence of the want of legal notice, to call for proof on the other side; which was made in respect of nine of the ten hundreds in New Castle county. The proof as to the tenth was, that the sheriff gave the advertisements to a person to put them up there, and another person thought he had seen them up, but was not certain, because this property had been advertised several times. Notice was given also in a newspa-

per and a copy left with defendant, but these notices did not specify the quarries which made the property so valuable.

Mr. Wales contended, that this was not sufficient notice. That a sale of this magnitude ought to have been advertised in the fullest and most public manner. The law requires the sheriff to make a sufficient number of advertisements to be fixed in the most public place of each hundred, at least ten days before the sale. This does not confine it to one advertisement for each hundred. In regard to Red Lion hundred, the only notice proved was that the advertisement was seen at one place on the 1st of October, within the ten days. *Mr. Sutton*, the innkeeper, had no knowledge of it. Why no notices at Delaware city in the same hundred? In respect to Pencader hundred no notice was proved. The landlord had no knowledge of it. One witness saw an advertisement, but could not say it was for this sale; and there were three sales. The notices were also defective, because they did not describe the lime quarries. The St. George's notices were not put up until the evening of the 30th of September, for a sale on the 10th of October. Is this "at least ten days before the sale?"

Mr. Gray, contra, said there can be no doubt that there has been a liberal public notice of this sale, in forms better calculated for the object than the legal notice. But the question is, whether the legal notice is proved. It is so without doubt as to all the hundreds but Pencader. As to that the sheriff swears that on Thursday or Friday of the last week of September, the advertisements were sent to Pencader. James Nicholson thinks he saw two advertisements in Pencader of the sale of Jeans' real property; and this is sufficient to satisfy the court that advertisement was made in each hundred of the county. In addition, the sheriff advertised in the newspaper, which the law does not require.

Rogers, jr.—This is entirely a question of regularity in the proceedings of the officer; and the presumption is in their favor. The law requires only one advertisement to be posted in each hundred. This and more than this has been done, though the proof as to one is not positive and absolute.

The Court set aside the sale on the ground that there was no proof that the notice was put up in Pencader hundred, ten days before the sale. It is true the presumption of law is, that the sheriff did his duty, but that presumption cannot operate against proof by the sheriff himself, that he did not put up the notice in Pencader, but sent it out by a stranger, and there is no proof that it was put up ten

days before the sale. James Nicholson thinks he saw this advertisement up in Pencader, but he is doubtful as to that. Even if he saw it he does not prove that it was up ten days; and the tavern-keeper says he never saw it there.

We doubt not there was ample notice of this sale, better than the notice required by law; but still the legal notice must be given and proved. It was susceptible of positive proof that these notices were put up in due time, and as this has not been done we set the sale aside. As to the proof of notice in St. George's, we think it sufficient. The day of putting up is to be counted, if the day of sale is excluded. This has been the practice. But additionally it would, according to the general rule of law, make the ten days expire on the 9th of October, for notices put up on the 30th of September.

Wales and J. M. Clayton, for the rule.

Gray, Whately and Rogers, jr., contra.



JAMES SHUTE and wife *vs.* BENJAMIN GOULD; for the use of BAUDUY SIMMONS:

Any justice of the peace of the county may take and certify affidavits, to be used in court as the foundation of a motion to the court.

The Court, on motion, struck off the use endorsed on a judgment by husband and wife in favor of the assignee of the wife, though the bond was to the husband and wife and the survivor. The bond vests in the husband entirely during coverture.

JUDGMENT in debt without writ.

Mr. Patterson obtained a rule to show cause why the use in this case should not be struck out, founded on an affidavit of James Shute; taken before Thomas McDowell, Esq., one of the justices of the peace for New Castle county.

Mr. Whately objected to the affidavit, that it was improperly taken before any one other than the prothonotary; and if a justice of the peace could administer an oath for such a purpose, that it did not appear in this case that McDowell was a justice of the peace, as he did not take the affidavit in his official capacity, or certify it under his official signature.

Mr. Patterson replied, that the objection was too late. That a justice of the peace may administer an oath in any proper case and take and certify such an affidavit as this. That the evidence of

the official capacity of Thomas McDowell is of record in the recorder's office; and will be noticed by the court without proof.

The Court overruled the objections to the affidavit except as to the official signature of the magistrate, which they allowed to be amended; and, in the mean time, went on with the case.

It appeared on the evidence, that on the 18th of March, 1844, a bond was given by Benjamin Gould to James W. Shute and Elizabeth, his wife, or the survivor of them, for \$100. Shute and his wife separated, and she went off with an adulterer; and having clandestinely obtained possession of the bond, she sold it to Frederick Leonard, Esq., in July, 1844, and assigned it before one witness. Mr. Leonard assigned it in the same way to Bauduy Simmons, on the 8th of August, 1844; when the judgment was confessed at the suit of James Shute and wife for the use of Simmons.

On this state of facts the court made absolute the rule for striking out the use. The bond vests in the husband during his life. A married woman can have no right to personal property during coverture; it vests in the husband. (*Chitty on Cont.* 176; *2 Harr. Rep.* 49; *Ibid* 74; *3 Ibid* 87.)

Rule absolute—use stricken out.

Patterson, for the rule.

Whitely, contra.



DAVID BROWN, Ex'r. of THOMAS PUSEY vs. THOMAS SMYTH.

The Court cannot allow the amendment of a judgment confessed severally on a joint bond, by adding the name of the co-obligor.

THE sheriff of New Castle county, by his petition, represented that he had sold the lands of Thomas Smyth, the defendant, by virtue of a writ of levari facias, at the suit of David Brown, executor of Thomas Pusey, for the sum of \$2,235, and that there was a balance in his hands of \$488 07, which was claimed by sundry judgment creditors of the said Thomas Smyth, to wit: by Abel Jeans on two executions; by Reader, for the use of Benjamin Chandler; and also by the defendant himself. He brought the money into court and *Mr. Gray*, for the defendant, moved for leave to take it out. The application was opposed by *Mr. Wales*, for Abel Jeans, and *Mr. Chandler*, for the Reader judgment. The defendant alledged that these judgments were paid; and moreover, that the Reader judgment was

illegally entered against him on a bond and warrant of attorney given by him jointly with another. On his affidavit *Mr. Gray* also moved to vacate this judgment.

On the first judgment of Jeans, which was entered the 1st of April, 1826, for \$224, with a credit endorsed of \$70, a fi. fa., was issued to May term, 1826, which was returned, levied on goods as per inventory amounting to \$417; and on land subject, &c.; and there were no subsequent proceedings. The second judgment was entered on the 15th of April, 1826, for \$191 68, a fi. fa., issued to May term, 1826, which was levied; alias fi. fa., to May term, 1836, the return to which showed payment of all but \$11.

Mr. Gray contended, that the levy on Jeans' executions to the amount was a legal payment, unless it be shown to have been otherwise disposed of. This presumption was strengthened by the lapse of eighteen years, during which no proceeding had been had on the first judgment; and by the proceedings on the second judgment to the extent, nearly, of satisfying it in fact, as it was satisfied in law. With regard to the judgment of Reader for the use of Chandler, it was no judgment lawfully entered. It was confessed by virtue of a warrant of attorney, authorizing the confession of judgment against Smyth and another jointly. The judgment was against Smyth alone.

On the separate affidavit of Smith now filed, he moved the court to strike off this judgment.

Mr. Wales.—As to the Jeans judgments the question is not whether the presumption of payment by a levy to the amount should exist as between creditors; but it is whether the defendant himself, without affidavit that the money had been made under the levy, or any proceeding to get rid of the judgment; availing himself of a mere presumption; shall be allowed to consider the judgment as paid in fact.

The Court here arrested the discussion, and ordered an issue to try if any thing, and what, was due to Jeans on his judgments; and, by consent, this was referred to C. D. Blaney; and, as to Reader's judgment, rule to show cause why it should not be vacated as not authorized by the warrant. It appeared by the bond and warrant of attorney to confess judgment, that the bond was joint and several, and the warrant joint, and the judgment was against the defendant, Smyth, alone.

Mr. Chandler asked leave to amend the judgment by inserting the name of William J. Reader, a co-obligor in the bond.

Court.—The motion is to amend the judgment against Smyth by

adding the name of Wm. J. Reader. The judgment is a ~~several~~ judgment against Smyth, on a joint warrant to confess judgment against Reader and Smyth. The court has no authority to authorize a judgment different from the power of attorney; and the entry of a judgment different from the power is unauthorized, and cannot in any form be cured. The application to amend by inserting a new defendant is an application *after* judgment, not merely to amend, but to make a judgment, including the making new parties. Such an amendment cannot be allowed.

Amendment refused; and judgment stricken out.

The parties now compromised; and the rule was made absolute for the payment of the balance in court to the defendant, Smyth.

Gray, for the motion.

Wales and *Chandler*, contra.



WILLIAM NICHOLSON, Administrator of ANN FARIS vs. THOMAS FRAZIER.

A judgment creditor fully secured by the real estate of an intestate, and who has no specific lien on the personal property, is a competent witness for the administrator, in an action to recover a debt due the intestate. A receipt is not conclusive evidence of payment. If attacked on the ground of *mistake*, the plaintiff ought to be able to show in what the mistake consists.

THIS was an action of scire facias on a mortgage for \$1,053 80, with interest from the 25th of March, 1837. There were credits indorsed:—5th of Nov., 1840, \$300; 30th of March, 1841, \$390; 27th of June, 1842, \$50; October, 1842, \$50. The plea was “payment;” and the defendant produced a further receipt, signed Ann Faris, and dated April 20, 1843, for \$676 64. He called a witness to prove this receipt, who had seen Ann Faris write, and swore “that this looked like her signature; he would not swear positively it was her's, but should think it hers.” The body of the receipt was Thomas Frazier's handwriting. On this proof the receipt was admitted in evidence, and defendant closed.

The plaintiff objected to this receipt, that it was either false altogether; or, if ever given by Ann Faris, it was given under a mistake, and without payment of the money. He called a witness, who, being sworn on the voire dire, stated that he was a judgment

creditor of Ann Faris' estate; but that his debt was amply secured by liens on her real property, and he had no specific or execution lien on her personal property. He was objected to as incompetent from interest.

By the Court:

The principle governing the admissibility of evidence is a *direct* interest in the event of the suit, or an interest in the record, i. e., where the verdict and judgment may be given in evidence for or against the witness. The question whether Mrs. Faris' estate is sufficient to pay her debts, cannot be tried in this suit; and the interest of witness, if any, is contingent. He is a creditor of that estate, perfectly secured as he says; but that is for the jury, if they shall judge it impairs his credit. This is our view at present; no authority having been cited directly bearing on the question. (1 *Stark. Evid.* 103.) A disqualifying interest "must be a present, certain, vested interest; and not uncertain or contingent. (1 *Greenl. Ev.* § 389.) "The disqualifying interest of the witness, must be in the event of the cause itself, and not in the question to be decided." Thus a creditor may be a witness for his debtor, cites, *Paull. vs. Brown*, 6 *Esp.* 34; *Nowell vs. Davies*, 5 *B. & Ald.* 368; yet a creditor of a bankrupt, or other person, is not a good witness to increase or preserve a fund out of which he is entitled to be paid, *Ibid* § 392, and the cases referred to in the note. (*Ibid* § 390.) The true test of the interest of a witness, is that he will either gain or lose by the direct legal operation and effect of the judgment; or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest; and not an interest uncertain, remote, or contingent. Thus the heir apparent to an estate, is a competent witness in support of the claim of his ancestor; though one who has a vested interest in remainder, is not competent. (1 *Serg. & Rawle* 36.) The interest must be certain, not possible, or even probable; he must be a positive gainer by the event of the cause. An attorney is a competent witness, though he expects a larger fee if his client recover. (See also, 1 *Harr. Rep.* 43, 130.)

The witness was sworn in chief; and on his testimony and that of others, the case went to the jury, after argument by *Mr. Gray*, for the plaintiff, and *Mr. Rogers*, for the defendant; the Court by

HARRINGTON, Justice, charging:—That the case depended on the question whether there was in fact a payment made by the defendant, to Mrs. Faris, on the 20th of April, 1843, of the sum of \$676 64.

In the first place, it was for the defendant to prove the payment. He offers to do so by producing this receipt, which he says is the genuine receipt of Mrs. Faris; signed by her, and delivered to him, as the evidence of the payment. If this receipt be genuine, it is very strong evidence of the payment; the strongest kind of evidence; but not absolutely conclusive. Though genuine, it may still be controverted and shown to have been given under a mistake; but in such case it is for the plaintiff to satisfy the jury of the mistake, and in what respect that mistake consists. And if the jury were satisfied of this, they must find a verdict for the plaintiff, notwithstanding her receipt; for their object was truth, and the receipt, as well as the oral testimony were but means of reaching the truth; but before they would discredit a genuine receipt on the ground of *mistake*, the jury should reasonably require that the plaintiff shall show them how the mistake arose, or in what respect it exists; as by fraud, accident, error in calculation, collusion, &c. &c.

This was on the supposition that the receipt of the 20th of April, 1813, was *genuine*. If not genuine, it could have no force or effect as evidence, and the whole defence failed. The receipt was in evidence. It was admitted by the court as sufficiently proved to go before the jury; leaving it still for them to decide whether it was the genuine receipt of Ann Faris, and the name subscribed to it was in her own proper handwriting.

Verdict for the defendant.

Gray, for plaintiff.

Rogers, jr., for defendant.

SUPERIOR COURT.

SPRING SESSIONS,

1845.

Regula Generalis.

No. 44. In all actions ex contractu pending in this court, judgment for the plaintiff shall, on motion, be entered at the second term, unless there be an allegation, supported by regular affidavit, that there is a legal defence to the action. Such affidavit shall be filed during the term, unless the court do, on motion, enlarge the time.

CURTIS STEAN *vs.* JAMES ANDERSON.

Actual possession is necessary to support trespass to real property. A constructive possession will not do.

After an ouster, the plaintiff cannot recover damages for subsequent trespasses, without a re-entry. After re-entry, he may lay his action with a continuando, and recover for mesne profits as well as damages for the ouster.

The judgment in partition, by rule of court, is conclusive of title between the parties and all claiming under them.

The verdict in one action of trespass, is evidence in another, between the same parties; but conclusive only of the fact and date of the trespass, and of plaintiff's possession at that time. His possession will be presumed to continue, unless the contrary appear.

At the term after a trial, the court heard an application to tax costs as to the proved attendance of witnesses; and ordered the prothonotary to ascertain the true attendance, with notice to the witnesses.

THIS was an action of trespass, quare clausum fregit; commenced March 23, 1842; tried April term, 1845. The pleas were not guilty, and the act of limitation.

The plaintiff prefaced proof of the trespass, by evidence that he was in possession of the premises, by assignment from one Truitt Thompson, who held under a judgment in partition, to which the defendant was a party. He traced the title from a certain Miles Jones, who died in 1806, leaving to survive him five children, among

whom was Elizabeth, the wife of Peter Butler. Elizabeth Butler died in 1813, leaving her husband and three daughters, Elizabeth, who married, first, Daniel Clifton, and after his death, Lewis Allen; Priscilla, who married Levin Records; and Betsey, who married James Lawless. Daniel Clifton and wife, executed a conveyance bond for their share of the Jones land, to Truitt Thompson, who, in 1833, assigned it by indorsement on the conveyance bond, in due form, to the plaintiff. The execution of the bond by Clifton and wife, was not fully proved, as the assignment was. The bond and assignment were lost. The loss was proved by the plaintiff, and by the testimony of the executor of Mr. Ridgely, in whose possession it was last seen; of Mr. Layton, his successor; and of the administrator of Mr. Brinckloe, his colleague, that they had made diligent search.

After this evidence of the existence and loss of the paper, which the court considered sufficient, plaintiff proposed to prove its contents; and asked a witness, whether the assignment of Thompson, was not of certain land then in his possession, formerly the property of Miles Jones? This was objected to.

Houston.—The *execution* of the bond from Clifton and wife, to Thompson, which was assigned to Stean, is not proved. It can be proved only by the attesting witnesses, or proof of their handwriting. The effort now is to prove the contents of the bond without proving its execution. The lost bond must have been proved to have been a legal bond. (1 Stark. Ev. 354.)

Court.—For the purpose of proving a transmission of title from Clifton and wife, to Truitt Thompson, this evidence is not admissible, because the execution of that bond is not proved; but an assignment of land has been proved, regularly executed from Thompson and wife, to Stean, and this assignment is the lost paper; the contents and object of that assignment may be proved, and also, the possession of Stean under it.

The witness proved that it was an assignment of the Miles Jones land, then in possession of Truitt Thompson. Stean went into possession immediately thereafter.

Plaintiff then offered the record of an amicable action between Truitt Thompson, assignee of Daniel Clifton and Elizabeth his wife; Levin Records, jr. and Priscilla his wife; James Lawless, jr. and Betsey his wife, plaintiffs; and James Anderson, assignee of Thomas Jones; Nathaniel Jones; James C. Jones; Joseph Warrington and Mary his wife, defendants. It was an amicable action in partition,

entered April 8, 1831, and partition was made amongst the parties, severally, by metes and bounds, on November 15, 1831. The record was objected to.

By the Court:

The record is admitted. It purports to prove an amicable partition of the lands of Miles Jones, between Truitt Thompson and others, and James Anderson. Stean has been connected by evidence with Truitt Thompson, as a privy in estate; and is therefore, as a party to said partition. The assignment from Thompson, to Stean, was after this partition and his possession under it. The partition was in 1831; the assignment about the year 1833. (a) It was proved that

(a) At a subsequent trial had at April term, 1847, between this plaintiff and James Anderson, Nutter Marvel and Lewis Jones, this record was excluded after full argument.

The first objection to it was that the *submission* was upon a separate paper, stated on the docket to be on file, but which could not be found. The court overruled this objection, saying that by the act of 1811, *Dig.* 112, the judgment on this amicable action could not be reversed for want of this paper; and the record was evidence without it; proof having been made of its existence and loss. They would, therefore, admit the record when Stean's *privity* with any party to it was made out.

The plaintiff contended that he had done this by proof of the alienation bond from Daniel Clifton and wife to Truitt Thompson, assigned to Curtis Stean.

The defendants objected that the alienation bond of Clifton and wife conveyed no title, being void in itself as the bond of a married woman, and expressly prohibited by the statutes of conveyance. That at most it conveyed only an *equitable* estate for Clifton's lifetime.

Plaintiff replied that Anderson was estopped by the judgment in partition to deny the title of Truitt Thompson.

Bayard.—1. We do not deny the title of Thompson. The party who shows it, shows that it was a mere life estate for the life of Clifton, who is dead. We are not estopped to show the title of Mrs. Clifton. (*Arch. Civ. Pl.* 209.) 2. It is estoppel against estoppel, and the matter is at large. In showing his own *privity* with Thompson, the plaintiff is obliged to show a title yet existing in Mrs. Clifton, which he is estopped to deny. 3. The principle of estoppel applies only to the estate admitted by the matter of estoppel, which in this case was a life estate now expired. 4. In order to raise the estoppel, the plaintiff is bound to show *privity in estate*, which requires *privity* of *legal* estate with Thompson, and he has shown but an *equitable* title, which does not establish a *privity*. (22 *Com. Law Rep.* 73; 32 *Ibid* 42.) 5. That in this amicable action in partition, there was

Anderson and Thompson were both present at this partition of the lands of Miles Jones. Thompson claimed the share of Daniel Clifton and wife. He did not show any papers. Anderson did not object to his title. Anderson claimed the share of several of the Jones

no judgment of the court reaching the title, but only a judgment of confirmation on the division. That in such an action the question of title was not referred, but only the question of partition. 6. A party estopped by partition is only estopped as to any title existing at the time, and not as to any title subsequently derived from a party not bound by the partition.

Layton replied.—1. The judgment is a judgment in partition, and establishes the title of the parties and all privies; and estops each from denying the other's right. (*Allnatt Part.* 53, 63.) 2. The action and judgment in partition operates on James Anderson and all the other parties and their privies, by way of estoppel to deny the title; and is equivalent to a conveyance with covenants of warranty. (*1 Greenl. Ev.* 29; *9 Cranch R.* 43; *11 Johns. R.* 91; *14 Ibid* 97; *1 Harr. Rep.* 110, 139; *1 Salk.* 276.) If two join in partition where one has no estate, he thereby gains a moiety by estoppel. (*Allnatt Part.* 144-9; *Co. Litt.* 170-6.) Rose (bastard elder) and Ann (legitimate younger) sisters, make partition; Ann is concluded by estoppel to deny Rose's title. 3. It is not competent for a party to the partition to set up any title, even after acquired, and from a person not bound by the partition, in opposition to the title which by partition he admits in any other party.

The Court:

Booth, Chief Justice.—We concede the doctrines of estoppel urged by the plaintiff, to the extent that the effect of a partition is to estop any party to it to deny the title of the other parties; and may even apply to titles subsequently acquired by such parties; and that it extends to privies in estate.

But the question is, whether the plaintiff has shown himself a privy in estate with Truitt Thompson. James Anderson as a party to the partition suit is estopped to deny the title of Truitt Thompson, although in fact that title is defective, as now appears, being no more than an equitable title for the life of Daniel Clifton, who is dead. The point, therefore, on which the admission of this record turns, is whether Curtis Stean has shown privity of estate with Truitt Thompson.

In order to place himself in the position of Truitt Thompson, he must show some conveyance to himself of the estate which Thompson held, or which Anderson recognized him as holding under the partition. How does he prove this? By any conveyance operating on the legal estate? By any proof of any estate in the land? Neither. Simply by an indorsement of Thompson, on an alienation bond of Clifton, (now dead;) which bond and

heirs, and their share was laid off to him. Thompson went into possession under this partition, and Stean succeeded him after the assignment.

There had been two former trials between these parties, the first, at April term, 1841, which resulted in a verdict for plaintiff, for \$20; a new trial had at the October term, 1841, when the verdict was for plaintiff, for \$98 75.

The Chief Justice was examined as to what was proved on the former trial. The defendant then set up title as a defence. Whether that and the present case are for the same place, he could not yet possibly know. Other witnesses proved that it was for a trespass on the same land. That the defendant took forcible possession of it in 1841 or 1842, and had been in possession since. Plaintiff then proved certain cutting done on the land by defendant's orders, and closed.

Wootten, for defendant.—Miles Jones, died seized in 1806, leaving several children. Anderson bought out most or all of the heirs at law. Defendant claims under the pretence of a title from Mrs. Clifton and Truitt Thompson. Daniel Clifton married one of the children of Miles Jones, and was entitled to only a life estate in her share. Even if she joined her husband in making an alienation bond, this did not convey her title. After Daniel Clifton's death, Lewis Allen, married the widow of Clifton, and with her, conveyed to Anderson, in due form. Anderson brought an action of ejectment, and was defeated on the ground that Peter Butler, who had married another heir under whom plaintiff claimed, was shown to be alive, and was entitled to a life estate in the land. After this trial, a creditor of Peter Butler, sold his interest in the land and it was bought by James Anderson. Anderson now brought ejectment again

assignment conveyed no estate, but gave the party a right in equity to the conveyance of an estate in the land, for the life of Daniel Clifton. Can we now, when it is shown that this life estate has expired, give to such an assignment, the effect of conveying any estate from Thompson to Stean?

We do not think this sufficient evidence of privity of estate between Thompson and Stean, to make Stean a privy to these partition proceedings; and we therefore, exclude them. At the previous trial of this case, the admission of this record was not particularly objected to on this ground, and the argument was altogether upon the effect of it when admitted; and we affirmed the general positions contended for by the plaintiff's counsel, and now repeat them.

Exception prayed and granted.

against Stean; when Stean abandoned the possession, cut up the corn, and moved off the fence. From that time to this, Anderson has been in the peaceable possession. The defendant proved the deeds of Thomas Jones, Nathaniel Jones, James C. Jones, and Warrington and wife, to James Anderson, for their respective shares of the Jones land; and offered in evidence the deed of Lewis Allen and wife, to him, for the share of Clifton's wife. This was objected to on the ground that the deed was executed since the amicable action between Anderson and Truitt Thompson and the others; and it was not competent for Anderson to prove title against that partition; especially title which was then admitted to be in Thompson, and since acquired from Clifton's wife.

Court.—The question immediately before the court, is whether the deed of Lewis Allen and wife, to James Anderson, executed since the partition suit in which Anderson was a party, for the share of Mrs. Allen, (formerly Clifton,) daughter of Miles Jones, is admissible in evidence for Anderson, on the question of title. We think it is not; on the settled principle that the judgment of a court of competent jurisdiction, is conclusive on the parties, and their privies. By this partition it is settled, at least so far as James Anderson is concerned, that the locus in quo, belonged to Truitt Thompson, as the assignee of Daniel Clifton and wife. And though it might be that Mrs. Clifton, not being a party to the partition suit, might controvert the title of Thompson, yet Anderson cannot; and though Curtis Stean has not shown any lawful assignment of the title of Thompson, or any other lawful title, if he was in possession at the time of the trespass, he may maintain this action for a wrong done to the possession. As to the recovery in the former action of trespass, it is conclusive of nothing more than that the plaintiff was in possession of the place where that act of trespass was committed, at the time it was committed, and that the defendant was guilty of the trespass.

The defendant then proved that in October, 1838, the plaintiff hauled away the fence and cut up the corn by the roots. He said the defendant might get the land but should not have the fence. The land lay out until March, 1839, when Anderson enclosed it, and has been in possession ever since. The plaintiff said he had abandoned it under advice of counsel.

McFee, to the jury.—Every continuance of a trespass is a new trespass. (20 *Vin. Ab.* 467; 16 *Johns.* 314; 10 *Ibid* 338.)

Actual possession is not necessary to maintain trespass. A con-

structive possession is sufficient. (11 *Johns.* 395; 4 *Taunt.* 547; 5 *Bac. Ab.* 167; *Ros. Ev.* 378.)

Continual claim is an entry in law. (3 *Com. Dig.* 61; 9 *Vin.* 111; 2 *Johns.* 22; 4 *Ibid.* 211; 11 *Johns.* 504.) Defendant cannot acquire a right by his own unlawful act.

Houston, for defendant.—Plaintiff was out of possession in March, 1830, when defendant put up the fence. He had voluntarily abandoned a possession which was about to bring upon him an action of ejectment.

Trespass can be maintained only when there is an actual possession. (3 *Steph. N. P.* 2632; 1 *Ch. Pl.* 176, n.; 1 *Harr. Rep.* 335.) Plaintiff must be in actual possession, and a tortious entry will not give possession.

Plaintiff can recover for nothing more than the simple ouster; and not for intermediate injuries, or profits of the land, unless he has re-entered. (3 *Steph.* 2634; 2 *Leigh. N. P.* 1442; 19 *Wend.* 507.)

Layton, for plaintiff.—The general rule that a plaintiff must be in actual possession of land to maintain trespass, is subject to many exceptions, and this is one. Where a party is turned out of possession, and either enters or makes continual claim, he may maintain trespass. A continual claim is equivalent to an entry. (20 *Vin.* 467; *Co. Litt.* 256, b.; 3 *Com. Dig. Cont. Claim.* 1; 9 *Vin.* 110; 5 *Bac.* 107.)

The *Chief Justice*, charged the jury.—To sustain the action of trespass to real property, there must be an actual possession. A constructive possession, as in case of goods and chattels, is not sufficient.

The record of the proceedings and judgment in the amicable action of partition, ats. of Truitt Thompson, assignee of Daniel Clifton and wife, and others *vs.* James Anderson, assignee of Thomas Jones, and others, are final and conclusive between the parties and all claiming under them, as to the title to the lands allotted to the several parties. Therefore, if Stean went into possession, and held under Truitt Thompson, Anderson would be a trespasser by invading that possession.

The verdict and judgment in the action of trespass of Stean *vs.* Anderson, tried in 1841, for a trespass in carrying away plaintiff's fence, in 1838, are final and conclusive: 1st. That such a trespass was committed by the defendant. 2d. That the plaintiff was in the actual possession of the land where, and at the time when, the trespass was committed. This land, it is alleged is the same, with that which is now in question in this cause. Having been in actual pos-

session in 1838, it is to be presumed that such possession continued in the plaintiff, unless it be shown that he divested himself of it by relinquishing or abandoning it before the alleged trespass was committed by the defendant; because a tortious or unlawful entry will not give possession to defendant.

If the plaintiff was in the actual possession at the time defendant enclosed the field, and ousted the plaintiff,—defendant's counsel contends that plaintiff can recover damages only for the simple trespass of ouster, and not for any intermediate injuries, unless he afterwards re-entered. And therefore, if this ouster was more than three years before the 23d of March, 1842, the commencement of this suit, the plaintiff is barred by the act of limitation.

We consider the law to be this:—After an ouster the plaintiff can recover only for the simple trespass or first entry of the defendant; for although where there is an ouster, every subsequent act is a continuance of the trespass; yet in order to entitle the plaintiff to recover damages for such subsequent acts, there must be a re-entry on his part. But after a re-entry, the plaintiff may lay his action with a continuando, and recover mesne profits, as well as damages for the ouster. (20 *Viner* 467.)

Verdict for plaintiff—damages six cents.

McFee and Layton, for plaintiff.

Houston and Wootten, for defendant.

At the October term, 1845, *Wootten* and *Houston*, for plaintiff, moved the court to tax the costs in this case, stating that some of the witnesses had proved eighteen days' attendance, while others, who had attended every day whilst the cause was pending, proved only twelve days. The court were disposed to hear the evidence, but the witnesses themselves were not present; and they ordered that the prothonotary should ascertain the true time of the attendance of these witnesses, with notice to them, by the first rule day in vacation.

WILLIAM O. REDDEN vs. PRESLEY SPRUANCE and others.

Stage proprietors are liable to the master of a slave for taking him as a passenger, knowing him to be a slave, and thus aiding his escape.

And they are bound to inquire with *due diligence* into the condition of colored passengers.

Suspicious circumstances, notice, &c., require the *utmost diligence*.

A colored man presenting himself in the night at a place where passengers were frequently taken up, and demanding passage; with nothing suspicious about him; giving his name and residence, and offering the written evidence of his freedom, was admitted as a passenger for a short distance, and set down for inability to pay his fare, before they arrived where his papers could be examined: held that this did not amount to *negligence*, though he should turn out to be a slave.

The admissions of the negro not evidence for the master.

The declarations of the master *at the time*, admitted as a part of the *res gesta* to show why he was at a certain place, and to connect his acts there with the case.

His book entries not proper evidence of expenditures in search of his slave.

A witness may refresh his memory by a letter written by him at the time, but must be able to swear from recollection as thus refreshed and not from the paper only. Much less is the letter itself evidence, though the witness is willing to swear to his belief that what the letter contained was true.

THIS was an action on the case against the defendants as owners of the People's line of stages from Georgetown to Wilmington, for carrying away plaintiff's slave "Jerry," and aiding him to escape from his master's service, *knowing him to be a slave*.

The plaintiff proved that his man "Jerry," reputed to be his slave, ran away from the service of W. Jones, to whom he was hired, on Saturday afternoon, May 25th, 1839, and was afterwards seen in Philadelphia, but was never recovered. A man named Watson left the county some time before Jerry did.

Azael Stevens, sworn.—Drove defendants' stages from Milford to Camden in the spring of 1839. Has frequently taken up passengers on the road; the route from Milford to Smyrna is a night route. One night about that time took up a colored man or boy, at the junction of the three roads near Canterbury. He called to me; said he wanted a passage; said he was a free man named Peter Clayton; offered me a paper which he said was a pass, which he got from squire Redden. It was dark and I could not read it. I took him on the box with me; after we passed Canterbury, he offered to sell me a pistol. He said he wanted money to pay his fare. I told him if he had no money he must get off, and I turned him off. I have not seen him since. He rode with me a very short way. I began the inquiry about him; asked his name, &c., as I didn't wish to carry

him without inquiry whether he had a right to go and could pay. He said he wanted to go to Philadelphia. I don't think it was Saturday night. I drove down the next day to Milford. Either the next night, or the next but one, I saw Redden at Milford. He called on me, and I told him what I now say. Mr. Redden then said a pass for Peter Clayton would answer pretty well for his boy where they were not known. There was no one with me that night in the stage. I understood Redden to admit that he had given Peter Clayton a pass. There was nothing like a runaway about the negro; no concealment. I had no suspicion he was a runaway. I don't think he could have overtaken the stage again that night. I know I left him behind.

The way-bill of May 25th, 1839, from Milford to Wilmington showed that a Mr. Watson entered from Milford to Wilmington; also a "*black man*" from Duck Creek to New Castle; also a "*black man*" from New Castle to Wilmington, who paid "*twenty-one cents, all he had.*"

The way-bill of the 31st of May, from Georgetown to Wilmington, showed that Wm. O. Redden was a passenger up.

Charles Palmer, sworn.—Saw a black man in New Castle, in May, 1839; a lightish colored negro, about twenty years old, five feet, eight or nine inches high; would weigh one hundred and sixty pounds. He was in company with John Watson. It was on Sunday morning, the 26th of May, between eight and ten o'clock, A. M., before the stage arrived. Qu. Did he admit himself to be the slave of Wm. O. Redden? Objected to and ruled out. (*State vs. Garrett, post.*) Heard Watson tell Jefferson, one of the defendants, *on Sunday afternoon*, that he knew this boy was running away from Redden, and that he ought to be taken up.

The plaintiff now offered to prove his own declaration when in New Castle, in May, 1839, that he was in search of a runaway slave; which, after argument, was admitted as a part of the res gesta, to show what caused his visit to New Castle.

The plaintiff then offered his book of accounts, in which he had charged the defendants with certain expenses occasioned by the search after this negro. Objected to, and ruled out, as not being matter of account; and being capable of proof otherwise.

Isaac H. Register, a witness, was shown a letter purporting to have been written by him to Mr. Redden, on the 30th of May, 1839, in relation to this negro, in order to refresh his memory as to the facts stated in that letter. The witness examined it and stated that

he had no recollection of the facts stated in the letter; but this letter was written by him. Its contents were then offered in evidence, and, after much argument, ruled out. Exception prayed and granted. (See post.)

The plaintiff had much difficulty in proving who were the owners of the stage line, it being a private association; a joint stock company without incorporation, or any public notification of the partners.

Wootton, for defendants, moved a nonsuit, for failure of the proof: 1st. That Redden *owned* the slave, Jerry. 2d. That he runaway. 3d. That the defendants were *owners* of a stage line from Georgetown to Wilmington, &c. 4th. That defendants' stages took the slave away. 5th. That they did so *knowing* that he was the runaway slave of Redden.

The motion was opposed on the following grounds:—1st. It is not necessary to prove that the defendants took the boy *out of the State*; none of the counts alledge this. 2d. There is proof that Jerry was the slave of Redden; and if *any* proof, the case should go to the jury. 3d. So of the defendants' *knowledge* that the boy was a slave. *Gross negligence* amounts to guilty knowledge. There were circumstances which ought to have put the driver at Canterbury on his guard. The knowledge must be proved, but neglecting to acquire knowledge makes them culpable, and knowledge may be inferred from circumstances. These must be left to the jury. A negro taken up on the road at eleven o'clock at night by a stage coach, will not be *presumed* to be a free man. A suspicious, strange negro is deemed to be a runaway. (*Law of Slavery* 392.)

The Court granted the nonsuit on the ground that there was no proof that the defendants carried the slave off with *knowledge* that he was a runaway slave of Wm. O. Redden. Even admitting that there was evidence that defendants carried the slave in their stage, at all sufficient to go to the jury, there is no evidence whatever from which the jury could draw any conclusion of a knowledge on the part of the defendants or their agent, that this was a runaway slave. Nor is there such evidence of neglecting to make due inquiry as will charge the defendants. The negro man who was taken up near Canterbury, and permitted to ride for a short distance, presented himself at no unusual time or place, nor under any suspicious circumstances, as the stage driver testifies. The stage upward from Milford always passes the place where this passenger was taken up in the night; and it is usual to take passengers up thus on the road. The driver did make inquiry of this passenger; the only investiga-

tion that he could make under the circumstances, for it was dark and he could not then read the pass which was freely offered, and the passenger was turned off the stage before it arrived at Camden, where the pass could have been examined by a light. Under these circumstances, a passenger claiming admission into a public stage at the usual time and place, claiming to be a free man, and offering the evidence of his freedom, the driver would not have been justified in refusing him a passage, at least until he arrived where he could make further inquiry in relation to him; and this, in our opinion, does not amount to any evidence of negligence, such as can charge the defendants with culpably aiding the escape of this slave; even if the passenger so taken up was the slave of plaintiff, of which we express no opinion, because on that point there may be said to be evidence which ought to be weighed by the jury.

There is no other proof of *knowledge*. The conversation of Watson with Jefferson, which is proved by Palmer, and which would have been sufficient to put him on his guard; and would have required of him the strictest investigation as to his passengers; was not until the afternoon of Sunday, after the stage (which passes in the morning) had gone to Wilmington, having as a passenger "a black man," who is now said to have been the plaintiff's slave, and in reference to whom this conversation was had. Admitting again, that the identity of these ought to be left to the jury, there is nothing in this conversation which proves *knowledge* in Mr. Jefferson or any other of the defendants, that their passenger was not a free man.

As it respects the point that the plaintiff cannot recover without proof that all the defendants sued were joint owners, we incline against the defendants, on the ground that in actions in tort against several defendants where the tort may be joint, the plaintiff may recover against a part of the defendants only. (*1 Chit. Plead.* 86.)

We therefore direct a nonsuit, with liberty to defendants to move to take off the nonsuit after the decision of the Court of Appeals, on the exception to the decision of the court, ruling out the contents of the letter written by the witness, Register, to the plaintiff; this question being, on motion, reserved for hearing before all the judges. (See post; June term, 1846.)

Houston and Layton, for plaintiff.

Wootton and Bates, for defendants.

PETER R. BURTON vs. WILLIAM R. WOLFE.

Objections to inquisition on lands heard after the return term, where the defendant had no notice or knowledge of the holding the same until after the term.

Quere. What is legal notice when the defendant lives out of the county?

The sheriff is bound to prove notice of sale of land strictly.

It seems that the sheriff is not bound to inquire on lands which have been sold and conveyed by the defendant and possession delivered, though such lands are bound by the judgment; at least until after condemnation of the other lands also bound.

Pl. fa. to April term, 1844, returned nulla bona; levied on land; inquiry held and not sufficient. Vend. exponas to October term, 1844, returned lands sold to Peter R. Burton for \$300; and not sufficient.

On affidavit of the defendant that he had no notice or knowledge of the inquisition, nor of the sale of the land until after the sale was made; that he had made sundry payments amounting to \$258, in discharge of the judgments inquired on which were not presented or allowed; that there were three tracts of land bound by the judgment which were not inquired on; that the lands actually inquired on were described as one tract, containing two hundred acres, more or less, whereas it was in two tracts, and contained near four hundred acres; that the land which sold for \$300 was worth \$1,200, and was sacrificed by reason of the efforts of plaintiff to prevent bidders from attending the sale: The court laid a rule at the return term of the venditioni exponas to show cause why the inquisition and also the sale should not be set aside.

On the hearing of this rule these questions arose:—

1. Whether objection to an inquisition on lands will be heard after the return term on proof of want of notice, or knowledge of the defendant of such inquisition.

2. Whether notice to the tenant of such defendant was sufficient, where the defendant resided out of the county, but within the State.

3. Whether the sheriff is bound, in inquiring upon lands, to consider lands bound by the judgment, but which the defendant has regularly sold and conveyed to third persons since the judgment, but before the inquisition.

4. Whether a notice of sale of land given through the post-office, addressed to a defendant residing out of the county, but within the State, is a lawful notice.

5. Whether absolute proof of ten advertisements posted in the

county by the sheriff must be made by the person who posted them, or others who saw them.

The Court set aside both the sale and inquisition, on the ground of want of legal notice, either of the inquisition or of the sale. The thirty-first rule of court requiring ten days' notice of inquisitions, makes no provision for nonresident defendants, and may be properly considered as extending to them until it is otherwise ruled. Yet it may in some cases occasion unnecessary cost and trouble to serve personal notice on defendants residing out of the county, and it may be necessary to explain or modify the rule in this respect. Until that is done the court must require personal notice to the defendant. (See post, *Wolfe vs. Heathers.*)

As to the advertisements of sale, the sheriff must be prepared to prove the putting up of at least one notice in each hundred of the county according to law. The posting of such notices is expressly required by law, and must not be left in any doubt.

As to the question whether the sheriff was bound to inquire on the three tracts sold by defendant, and out of his possession at the time of the inquisition, the court inclined strongly to the opinion that he was not bound to do so before condemnation and sale of the land remaining. If he were so bound it would often happen that lands so sold by a defendant, would have to be taken upon eligit to satisfy his debt before sale of his own land, though it is the admitted rule of equity and practice of courts of law, to levy the debt by such sale, before resort is had to other land bound by the judgment, but which have been aliened. If there be any supposed hardship in selling defendant's land without inquisition on all the land bound by plaintiff's judgment, it results from his own act of sale, and it would impose a greater hardship on his alienee to have the land extended for the payment of the vendor's debts before his own land was taken.

Rule absolute.

Cullen and McFee, for the rule.

Houston and Layton, contra.

WILLIAM N. CANNON, Ex'r. of ISAAC BRADLEY, deft. b. app'l't.
vs. WILLIAM S. MAULL, plff. b. resp't.

Money which one is bound to pay for another, but which has not been paid, cannot be recovered back in assumpsit on the common counts, though the plaintiff has given a bond to pay it.

A contract with several, either jointly or as partners, cannot be enforced by one of them alone.

THIS was an appeal from the judgment of John M. West, Esq., a justice of the peace for Sussex county, in an action of assumpsit for the hire of a hawser and anchor procured by plaintiff for the defendant's vessel in distress. The declaration was in assumpsit with the common money counts. Plea the general issue.

It appeared in evidence that the defendant below being the owner of the schooner Betsey Richards, which was stranded on Cape Henlopen, entered into a contract with the plaintiff, agreeing to pay him \$250 for getting her off and delivering her in Lewes creek, and that he also agreed to furnish the necessary anchors, cables, &c. The contract was signed by plaintiff as Wm. S. Maull & Co., though the agreement was made with him alone. The plaintiff got the vessel off the beach, but a storm coming on he was forced to part his cables and run up the bay, and again run her ashore. Whilst up the bay captain Maull hired a hawser and kedge anchor from the agent of the insurance offices and returned to Lewes, bringing the hawser and anchor with him. The person of whom these were hired demanded \$30 of Maull for the hire, and placed the claim in the hands of another agent of the underwriters to sue Maull. Upon which Maull brought this suit against Bradley and recovered.

Cullen, for defendant below contended, and the Court ruled:—

1. That in assumpsit, under the count for money paid, no recovery can be had upon a legal liability to pay money for defendant, or even upon giving bond for the payment. A payment must actually be made. (3 East. 169; 2 B. & A. 51; 1 East. Rep. 1; 2 Saund. Pl. & Ev. 192; 8 Johns. Rep. 202; Chit. Cont. 591; 3 Wend. R. 79.)

2. That if the contract was in fact made with the plaintiff below and other persons, either jointly or as partners, the plaintiff could not recover in his own name. (8 Wend. Rep. 542: Chit. Plead. 6, 8; 2 Saund. Pl. & Ev. 249, 272; 6 Com. L. Rep. 451.)

Verdict for defendant.

McFee and Houston, for plaintiff.

Cullen, for defendant.

AMOS STAYTON vs. MATILDA MORRIS.

A purchaser of land at sheriff's sale is entitled to rent from the day of sale. If the land be in possession of a tenant, the purchaser has remedy by distress or attachment.

But not so against any other than a person occupying by actual demise.

He may recover from any occupant a reasonable compensation in the action for use and occupation.

THIS was an issue directed under section nine, of the "Act concerning landlords and tenants," (*Dig. 365,*) to ascertain whether there was a just demand of rent, and the amount thereof.

"Section 9. When there shall be sufficient ground to believe, that a tenant intends to remove his effects from the county, where the demised premises are, before the rent will become due, so as to defeat a distress for said rent, the landlord or any credible person for him may, before the prothonotary of the Superior Court in said county, or any person officiating for him, make oath or affirmation, stating the rent and when it will be due, and that he does on good grounds believe, that the tenant intends to remove his effects from said county, and will remove the same before the said rent will be due; and thereupon a writ of attachment shall be issued," &c. "If the tenant deny the demand of rent, the court, whether he have given bond as aforesaid or not, shall direct an issue to be tried by a jury at the bar of said court, for ascertaining whether there be a just demand of rent, and the amount thereof, and the verdict upon such issue, unless set aside by the court, shall be conclusive."

The plaintiff claiming to be the landlord of the defendant, who occupied a certain farm purchased by him, caused a writ of attachment to be issued under the above provision, having made affidavit that the defendant is and ever since January 1, 1844, has been in the occupation of certain land in N. W. Fork hundred, to wit: fifty acres more or less, as tenant at the yearly rent of eighty dollars; which will be due and payable January 1, 1845, and deponent does on good grounds believe that said Matilda intends to remove her effects from the county, before the rent will become due, so as to defeat a distress for said rent.

At the return of the writ, the defendant entered a denial of the demand of rent; whereupon the court directed this issue.

It appeared in evidence that the land for which rent was claimed was the property of the late Constantine Morris, who was the defendant's husband. It was sold by the sheriff on judgment and ex-

cution, March 7, 1844, to Jacob Charles, and conveyed by deed dated April 26, 1844. Charles conveyed it on the 18th of July, 1844, to Amos Stayton, the plaintiff. Mrs. Morris occupied the farm in 1844, and the rent claimed was from March of that year to January, 1845. The defendant was the widow of Constantine Morris. She refused to pay any rent to Stayton; said she did not rent the farm of him, and would not pay rent unless compelled by law. At another time she said to Stayton that she had put his rent corn in a shed, on the south side, and he might take it when he pleased. He doubted whether it was enough. She said she had divided it fairly, and told him he had got his share of the brandy. He admitted that he had got some brandy, but alleged that it was not his full share. To another witness the defendant said, in December, 1844, that she was beating out corn and would pay Stayton his rent at new-year's day, but not before; but she also denied that she ever rented of him. The plaintiff's claim on all these occasions was for a share of the produce; one-third of the wheat, corn, brandy, &c.

The plaintiff's affidavit made at the time of issuing the attachment was offered in evidence by the defendant and admitted without objection. He swore to a *certain rent*.

The case was argued by *Mr. Cullen*, for plaintiff, and *Mr. Layton*, for the defendant.

Cullen.—Under a sale by sheriff, the purchaser becomes the landlord, and the person in possession becomes his tenant. (*9 Cowen's Rep.* 691.) Charles then became landlord, and Matilda Morris, tenant. If Amos Stayton could recover rent in an action for use and occupation; he is entitled to recover in this proceeding. Use and occupation lies upon an express or implied contract. (*2 Saund. Plead. & Evid.* 487, 891.) Satisfaction for use and occupation of lands by permission of a person, without demise by deed or contract under seal for the rent, may be recovered in an action of assumpsit. (*Dig. 365.*) This land was sold March 7, 1844, and purchased by Jacob Charles, under whose conveyance Stayton acquired all the rights which Charles had.

Layton, for defendant.—If land be sold at sheriff's sale, and there be a tenant, the purchaser recovers his proportion. But here the widow was in possession, and for ought that appears in this case, she was entitled to dower. There cannot therefore, be any implied promise on her part to pay rent. We never agreed to pay rent, or held as tenant. The plaintiff must make out a case here consistent with the act of assembly. (*Dig. 361.*) Distress lies only for a sum

certain, fixed by agreement of the parties. Under the act of assembly, the plaintiff can take out the attachment only in cases where the rent is certain; and for which a distress lies. Where there is merely an implied promise on which assumpsit for use and occupation lies, no distress can be had; and therefore, in such case the plaintiff cannot proceed by attachment. Plaintiff has not shown to what rent he is entitled, to what share, or what proportion, or who is entitled to the rent prior to the sale, and up to the day of sale.

Cullen.—The plaintiff is entitled to a compensation for the occupation of his land. The defendant acknowledged she owed rent on the 1st of January, 1845. We claim one year's rent because defendant was in the occupation of the land from January 1, 1844, to January 1, 1845. If Matilda Morris occupied these premises, and there was a demise express or implied, the plaintiff is entitled to recover; and as the value of the land is proved to have been \$70 or \$80 per annum, the plaintiff is entitled to recover that amount, or his proportion of it. The affidavit of the plaintiff has been given in evidence by the defendant and therefore it is evidence for all that is contained in it. It states a certain rent of \$80. Defendant paid part of rent, delivered brandy, and the grain she would not deliver until the 1st of January, 1844. Plaintiff could have turned defendant out of possession by applying for a writ of possession at the October term, 1844, but did not do so. The inference is that she agreed to pay him rent.

Booth, Chief Justice, charged the jury.—1. What are the rights which a purchaser at sheriff's sale acquires? Whatever title the defendant has in the land passes to the purchaser. He is also entitled to rent from the day of sale. The act of assembly provides, (*Dig. 213.*) “In any case of sale as aforesaid, the purchaser shall be entitled to rent for the premises sold, from the day of sale; if such premises be in possession of a tenant under rent, such rent shall be apportioned according to the time; the proportion for the time the rent has been growing due to the day of sale, being payable to the lessor or his assigns, and the residue to the purchaser; and each party shall have remedy by distress or action for his just proportion; and a purchaser may recover his proportion of rent, although such rent be reserved by deed (as well as rent from the day of sale, in case no rent has been reserved,) by an action of assumpsit for use and occupation.” Amos Stayton, therefore, as assignee of Charles, the purchaser at sheriff's sale, became entitled to the land as fully as Constantine Morris held it, and if the land had been in the pos-

session of a tenant, the act of assembly would give him remedy for the rent by distress. Even as against this defendant who was in possession as the widow of Constantine Morris, if she remained in possession, Mr. Stayton would be entitled to a reasonable rent, and could recover it in an action for use and occupation. But in regard to the remedy by distress, or the special remedy under the ninth section of the act concerning landlords and tenants, by way of attachment, the relation of landlord and tenant must exist by a *demise* for a *certain rent*. If then it is not proved that there was such a *demise* in this case, by which Mrs. Morris became the tenant of Mr. Stayton, under an agreement to pay a certain rent, Mr. Stayton was not entitled to the remedy by attachment, and cannot succeed in this issue.

If the relation of landlord and tenant exists at a certain rent, the verdict will be for plaintiff for that sum; if the relation does not exist, the verdict will be for defendant; if it does exist but no certain rent agreed on, the jury had better find a special verdict.

The jury found a verdict for plaintiff for \$22.

Motion was afterwards made "in arrest of judgment and that the court enter judgment for defendant, non obstante veredicto," for these reasons: 1. That the verdict was against the evidence. 2. That it was against the law. 3. That it was against the charge of the court. This motion was refused on the ground that there was no matter on the record on which the motion could act. A motion for a new trial was then made on the same grounds and refused.

Cullen, for plaintiff.

Layton, for defendant.

THE SMYRNA, LEIPSIC & PHILAD'A. STEAMBOAT CO. vs.
WILMON WHILLDIN.

Vessels, like carriages, meeting must, in general, keep to the right, unless circumstances, as of wind or tide, would render it improper. Having sufficient room to pass, neither is bound to go out of the way to get to the right.

These rules seem to be settled in reference to collisions, and questions of liability arising therefrom.

It seems that a vessel having the wind free, must get out of the way of one that is close hauled.

A vessel on the starboard tack may keep her wind ; a vessel on the larboard tack is bound to bear up, or heave about to avoid danger.

The vessel to windward is to keep away to avoid collision, when both vessels are going the same course in a narrow channel.

A steam vessel is regarded as having a wind, and is bound to give way to a vessel with sails.

The usage is for vessels having the tide to keep further out ; those stemming tide nearer the shore ; and this usage will be considered in questions of collision.

Vessels are bound to provide proper pilots, look outs, lights, &c., and are responsible for accidents resulting from the want of such care.

Trespass on the case is a proper form of action for a collision caused by such neglect. Exemplary damages may be given for a wilful collision.

For mere negligence, or want of skill the damages are compensatory only ; such as will restore the injured vessel to her former condition ; but not for detention, loss of profits, &c.

In case of mere accident, it is *damnum absque injuria*, and neither party can recover.

KENT, April term, 1845. This was an action of trespass for running down the steamboat "Kent" by the defendant's steamboat the "Sun."

These steamboats were proceeding in opposite directions on the night of the 4th of July, 1844, and met in the river near Gloucester Point, when a collision took place ; the Sun striking the Kent on the larboard side, and sinking her. The evidence as to the causes of the collision was conflicting. The plaintiffs' evidence was designed to show that there had been some rivalry between the boats in the morning about the wharf at Chester, which was taken by the Kent ; that she was returning at night well lighted up, on an ebb tide, well out in the river, with proper look outs and due caution ; when the Sun suddenly appeared on the left side bearing down upon the Kent and holding her course several minutes after the bell was rung, when she might have avoided the stroke ; that the Kent sunk in about half an hour, to the great danger and alarm of the passengers, to whose rescue the defendant did not come promptly, though he in fact rescued them all.

The defendant's evidence, on the contrary, was designed to show that there had been no rivalry between these boats; that his boat was returning with proper lights and look outs, and under express orders to keep near the western shore, out of the tide, and to run slowly for fear of injury to small pleasure boats; that being within a few feet of the shore as he turned the point, he suddenly came upon the Kent crossing his bows, and heading in for shore; that the collision was inevitable and occasioned by her being entirely out of place, and that the defendant did all in his power to rescue the passengers, his efforts being embarrassed by the misconduct of his own passengers in throwing overboard planks, &c., which got into and obstructed the wheels of his boat.

In the argument before the jury, the plaintiffs' counsel contended,

1. That the law of the sea as well as of the road, was "keep to the right;" or if varied at all by the wind or tide it was this, that vessels sailing *on* a wind (and steamboats always) are bound in meeting other boats, to port the helm, and pass to the right. (3 *Kent Com.* 231; *note*; *Westm. Review*, Sept. 1844, p. 61.)

2. That if *usage* could change the general law, no sufficient usage to the contrary was proved in this case; and no usage could excuse the running down a boat, though out of her proper track.

3. They claimed damages from the defendant on the ground of *negligence*: 1st. For not backing his engine when he saw the Kent. 2d. For not employing a competent night pilot, as Garretson, though a good day pilot, was from defect of sight, unfit to pilot the boat at night. 3d. For not keeping competent look outs, as Cobb, the look out, admitted he did not see the Kent until she was within ten feet of them; and 4th. Because the pilot, Garretson, by his own confession, mistook the lights of the Kent for lights on Windmill island. (5 *Carr. & Mar.* 236.)

They claimed as the measure of damages, the cost of repairing the Kent; the loss of time and profits she would have made in her usual business; the injury to the owners by diverting passengers into other channels; and the loss of passengers' baggage, for which plaintiffs were responsible. They estimated the damages on the ground of negligence at \$2,130.

4. They claimed exemplary damages if the jury should consider the collision to have been intentional and designed, not to run the Kent down, which they did not charge, but to "hit her a slap" for taking the wharf away from them at Chester. (4 *Harr. Rep.* 483; 41 *Com. L. Rep.* 196; 1 *Cromp. & Mea.* 29.)

The defendant's counsel contended:—

1. That the law of the road was not the law of the river; and that the general rule of "keep to the right" had no application to vessels passing in the Delaware, as to which a usage was fully proved for vessels going with the tide to keep out in the strength of the tide, while vessels stemming tide hugged the shore. They denied that even the law of the road would authorize a person to go out of his way to jostle a passenger who was on the wrong side, if there was room to pass. (*3 Harr. Rep.* 317-18; *5 Esp. N. P. Rep.* 43; *2 Ibid* 533, 685.) The law of the road grows out of the custom of the road; in England it is to pass to the left; in this country to pass to the right; the law of the river must equally depend on the custom of the river, and that custom is not to keep uniformly to the right or to the left, which would be impracticable; but to go as common sense and reason dictate, the boat stemming tide near the shore, and the boat having the tide, out in the strength of the tide.

2. That there was no evidence that the collision in this case was the result of design or of negligence on the part of the defendant; on the contrary, that it was caused by the negligence or unskillfulness of the plaintiffs' boat.

3. That in relation to damages neither the profits of the voyage or business, nor the loss of passengers, could be considered; for these were too uncertain and fluctuating. (*Cond. Sup. Ct. Rep.* 329, 699.)

4. Conceding that the form of action was proper, and that plaintiffs might sue either in trespass or case, they contended that the rule of damages was different in the two actions; and that in trespass the plaintiff could recover only for direct and not for consequential injuries; and nothing by way of exaggeration or example. (*1 B. Mun. (Kent'y.) Rep.* 80.) The only exception is for trespass, assault and battery, which stands upon peculiar grounds as a personal wrong.

By the Court:

BOOTH, *Chief Justice*, charged the jury.—He cautioned the jury against influences from extraneous remarks about "soulless corporations" or "public excitement." Corporations are collections of individuals entitled to the same protection to property in their aggregate or corporate capacity, as they would have in their individual capacity. The jury have nothing to do with "public excitement;" it is to have no influence on their verdict. Neither ought it to have any influence that the defendant is a "stranger" and not a citizen of this State. He trusted that before a Kent jury these considerations

could have no weight; nor any other considerations apart from the merits of the case, on the law and evidence.

He stated the case to be this:—Two steamboats, not rivals, no bad feeling, but the contrary, among captains or hands, on the 4th of July last, making excursion trips, the one to Philadelphia from Smyrna, the other from Philadelphia to Wilmington, met at Chester. The Kent got the wharf: was there any thing in this to cause rivalry or bad feeling? No object to get passengers, for the boats were running in different directions; nothing in this as proved to cause offence. The boats each returned that night; the Sun going up against an ebb tide, the Kent going down. They met near the Point-house; struck; and the Kent was sunk. Whose fault was this? If of the Sun the plaintiffs ought to recover; if otherwise, the verdict should be otherwise.

The injury must have resulted either 1st, from the defendant or his pilot (and it is no matter which, for the defendant was on board and is responsible for his pilot) wilfully running into the Kent; 2d, from his negligently running into the Kent; 3d, from the captain or pilot of the Kent running foul of the Sun through carelessness or ignorance; or 4th, the injury may have resulted from accident, without blame of either.

1. Did the injury arise from the intentional act of defendant? The evidence on this subject is circumstantial, and arises from the testimony of the two witnesses, Walker and Bennett. (The Chief Justice here reviewed their testimony, and the effect of it.) Its tendency is to charge defendant with the crime of wilfully putting in jeopardy the lives of one hundred and thirty passengers; a crime that ought to banish him from society, as unfit to live among men. These remarks are made to apprise the jury of the importance of being fully satisfied by the testimony on this point, before they allow it to influence their verdict. They should also consider the evidence offered to contradict these witnesses. The testimony of these witnesses, though contrary, does not necessarily involve either in perjury, for both classes of witnesses may have sworn conscientiously, yet one or both may have been mistaken.

2. Did the collision arise from negligence or want of skill? It is contended that the law of the river is the same with the law of the road, and that vessels in passing are bound to keep to the right. We fully accord with the authority cited in a note to Kent's Commentaries and referred to by plaintiffs' counsel. (3 *Kent Com.* 281, note.) The law of the road is that where two carriages meet on the public road, to avoid collision each shall keep to the right. So in

reference to steamboats meeting each other head on, and there is not room to pass without changing course, each should go to the right. But in either case if there be room to pass, a carriage or a boat, though on the wrong side of the road or river, is not bound to go entirely out of her track to get around another carriage or vessel which is so far out of her direct route that keeping right on would cause no collision to either, merely in order to pass to the right.

In reference to the mode of sailing or running steamboats on the river Delaware, by the custom as proved, as well as by the principles of common sense, vessels going against tide keep *in shore* out of the strength of the tide; whilst vessels going with the tide keep *out* in the strength of the tide. This is manifestly right, and properly enters into the consideration of the jury in ascertaining whether the plaintiffs' boat and the defendant's were run with proper prudence and caution, or which of them was guilty of improper conduct. By the course of sailing vessels or running steamboats, particularly the latter, the Sun ought to have been in shore, and the Kent further out. If either of them was out of this, their proper track, it is, so far as it goes, evidence of the want of proper care and skill. And if the Sun was near shore, and the Kent met her there, and attempted to pass still nearer the shore and thus crossed her bows, the collision would have arisen from the fault of the Kent being in an improper position, and running across the bows of the Sun.

But it is still said that there was negligence on the part of the defendant in not providing proper look-outs, or pilots; and in not backing his engine as soon as he might. This depends on the proof. A steamboat navigating by night is bound to have proper lights, and proper look-outs, to use all proper precaution to avoid and prevent accidents; the want of these precautions would render them liable; but if these precautions were observed by both these boats, and the lights of either were not seen by the other, it will be for the jury to say whether this was for want of proper look-outs, or from the improper position of either boat in the river, or from intervening objects on shore. The fact that lights, which are proved to have been up, were not seen, may enable the jury by reference to the other proof, to fix the position of the boats at the time of the collision, and determine why the lights of the Kent were not seen by the Sun. If it was for want of proper look-outs the defendant is culpable; if from the improper position of the Kent in shore, and the consequent obstruction caused by intervening objects, as trees or houses on shore, the accident would be attributable to the plaintiffs.

Damages are in the discretion of the jury. If the jury think that this boat was run into by captain Whilldin, willfully and designedly, they would be justified in awarding vindictive damages to any amount which, in the exercise of a sound judgment and discretion, they deem proper, by way of public example. Considering the time; the occasion; the defendant's knowledge of the number of passengers; a wilful sinking of the Kent would evince a reckless disregard of human life deserving the severest punishment. But in proportion to the enormity of the act, the jury ought to be cautious in crediting such a design, and should require the clearest proof of it. Even in case of gross negligence, exemplary damages may be given.

If the jury think the collision arose from the negligence of captain Whilldin, or want of skill in him or his pilot, for all of which he is bound, the verdict should be for the plaintiffs, for compensatory damages; that which would pay them for repairing and placing their boat in as good condition as when he injured it; but the plaintiffs will not be entitled to recover for any supposed profits they might have made from passengers, any more than in an action for not completing a contract for conveying title, the supposed profits of the land should be taken into consideration.

If the collision was occasioned by the negligence or improper conduct of the plaintiff's boat, they of course are not entitled to recover anything; neither can they recover if it was a mere accident, and not caused by the improper act or neglect of either party. In such case the loss is without remedy.

Verdict for plaintiffs \$1,875.

Bates, Frame, Layton and J. M. Clayton, for plaintiffs.

Comegys, Gray and Gilpin, for defendant.

JOHN ALLEN vs. JOHN MILES, Adm'r. of WILLIAM T. SMITH,
deceased.

An arbitrator is a competent witness on an objection to the award, to prove the facts submitted to them, and the grounds of their award.

The court will not review their judgment on the facts; but will correct a clear mistake of law, or fact.

Quere, if the presentment and demand of a promissory note *at the place of payment* is essential to charge any party to the note, other than an indorser.

If a bill or note be payable at a particular bank, or at the house of a particular person; and such bank or person is the holder; a formal demand is not necessary. It is sufficient if there be no funds of the drawer there.

And in this State, even where such bank or person is not the holder, a demand at the place of payment need not be averred by the plaintiff, nor proved, in an action against the maker of a promissory note or acceptor of a bill of exchange; though it must be proved to charge an indorser.

Arbitrators are not bound, though requested to do so, to make the evidence a part of their award.

NEW CASTLE, May term, 1845. Assumpsit; reference by rule of court; award for plaintiff for \$2,434.22. Rule to show cause, &c.

This was an action of assumpsit. The declaration contained five counts: 1st. On a promissory note, dated April 12th, 1839, made by the intestate, to the plaintiff, for \$278.83, payable five months after date, at the Farmers' Bank at Wilmington. 2d. On a promissory note of the same date, by the same maker, to the plaintiff, for \$280.19, payable six months after date, at the same bank. 3d. On a promissory note of the same date, by the intestate, to the plaintiff, for \$281.31, payable two hundred and ten days after date, at the same bank. 4th. That the intestate was indebted to the plaintiff in one thousand dollars, for goods sold and delivered; money lent; money paid by plaintiff for the intestate's use; money had and received by the intestate for the plaintiff's use; and money found to be due from the intestate to the plaintiff, on an account stated. 5th. For money found to be due from the defendant, as administrator, to the plaintiff, on an account stated between them.

To this declaration the defendant filed the usual pleas. After the cause was put at issue, it was referred by the agreement of parties, to Cornelius D. Blaney, Samuel M. Couper and Elihu Jefferson, to ascertain and award the amount due by the estate of William T. Smith, deceased, to the plaintiff, upon the cause of action in the declaration mentioned; and the reference was made a rule of court, subject to all legal exceptions. At the next term, to wit: May term last, the arbitrators returned an award in favor of the plaintiff, under the rule of court, for \$2,434.22.

To this award the defendant filed his exceptions as follows: 1st. That the acts and proceedings of the register were illegal and unconstitutional. 2d. That the account settled and decreed by the register is not the account of the administrator. 3d. That the register did not carefully examine the particulars of the said account with the proof thereof, in the presence of the administrator. 4th. That he settled the account of his own motion, and it was not filed or furnished by the administrator. 5th. That the account was not settled according to law; and the proceeding was irregular and illegal. 6th. That the register charged the administrator with desperate debts, and did not allow him proper credits, &c. &c.

Upon these exceptions, and the defendant's affidavit of the truth of the matters of fact set forth in them, a rule was granted to show cause why the award should not be set aside.

At the hearing of the rule, Mr. Blaney, one of the arbitrators, was offered as a witness by the defendant, to disclose the evidence produced before the arbitrators by the plaintiff, in support of his causes of action; and to show on what principles the arbitrators made their award. The plaintiff's counsel contended, that an arbitrator could not be examined as a witness for such purpose; but afterwards agreed that the testimony might be received, subject to the opinion of the court as to its admissibility. (2 Steph. N. P. 1820; 1 Term Rep. 11; *Kyd on Awards* 380; *Watson on Arbit.* 37.)

The arbitrator deposed in substance; that the three promissory notes mentioned in the declaration were laid before the arbitrators; that to each of the two notes first mentioned, was attached the certificate of protest of Jonas Pusey, a notary public, residing in Wilmington; and to the last mentioned note, the certificate of protest of Thomas McDowell, also a notary public, residing in the same place: That the certificates under the notarial seal of Jonas Pusey, did not set forth any presentment or demand of payment made at the bank: That upon his examination as a witness before the arbitrators, he could not recollect whether he did or did not present the notes at the bank, and demand payment there; but well recollects that he received the notes from the cashier, who called on him at his office, after banking hours, and informed him that the maker had no funds in bank for the payment of the notes; and requested the witness on behalf of the bank, to protest them for non-payment: That he did protest them; and immediately gave notice to the maker and the several indorsers. The arbitrator further testified that respecting the note last mentioned in the declaration, it was proved before the arbitrators, that the no-

tary, at the request of the Farmers' Bank, exhibited the note at their banking-house in Wilmington, demanded payment there, and received for answer from the cashier, that the maker had no funds in bank to pay the note; that the notary protested it for non-payment, and gave notice to the indorsers: That besides the three notes, the plaintiff produced before the arbitrators, sundry written orders or drafts, drawn by William T. Smith, in his life time, on the plaintiff, in favor of third persons, directing the plaintiff to let such persons have to the amount of the several sums of money specified in the respective orders, and to charge the same to the account of William T. Smith: That it was proved before the arbitrators, that the three notes were given by William T. Smith, for the purpose of taking up previous orders drawn by him on the plaintiff; and that the defendant had admitted, that an account produced by the plaintiff before the arbitrators, containing the three notes and the subsequent orders was correct, and that he promised to pay it.

The rule was argued by *Rogers*, in support of the motion; and by *Rodney* and *Gray*, contra.

The Chief Justice delivered the opinion of the court.

Booth, Chief Justice.—The first question submitted to the court is, whether an arbitrator is a competent witness to prove the facts thus deposed to. We are of the opinion that an arbitrator is a competent witness for such purpose, in the case of exceptions to an award returned under a rule of court entered into by virtue of the act of assembly of this State. The act declares, that the award or report of referees made according to the reference, *and approved by the court*, shall be deemed and taken to be as available in law, as the verdict of a jury. Upon exceptions taken to an award, the court cannot approve of it, and thus give it the effect of a verdict, without information of the matters that came under the cognizance of the arbitrators. They are the proper, and in most cases, the only witnesses to whom the court can resort to ascertain the facts proved before them; the documents, papers and accounts, and other evidence submitted by the parties. They may also be examined to disclose the grounds or principles on which the award was founded. But in no case will the court re-try the cause, or go into an examination of the merits of an award; or set it aside because they would have drawn different conclusions from the arbitrators, from conflicting testimony; or would have made a different award. But where it manifestly appears that the arbitrators have clearly mistaken the law, or that they knew what the law was, and purposely disregarded it, or that they have

made an evident mistake in matter of fact, the court are bound to set aside an award, as they are to set aside a verdict which is manifestly against the law or the facts.

The exceptions filed to this award allege, and the defendant's counsel has insisted before this court, that the arbitrators made a clear mistake in point of law, in awarding to the plaintiff, the amount of the promissory notes and orders. That in regard to the notes, they erred in law, because there was no proof either by the testimony of Jonas Pusey or by his notarial certificates, or in any other mode, that a presentment and demand of payment of the two notes first and secondly mentioned in the declaration, was made at the Farmers' Bank at Wilmington, where in the body of each note, they were made payable: That such presentment and demand are a condition precedent, and therefore essential to render even the maker of a promissory note liable at the suit of the payee: And that it is a settled rule of law, that where a particular place of payment is mentioned in the body of a bill of exchange or promissory note, whether the action is against the acceptor or drawer of the bill, or the maker or indorser of the note, the instrument must be presented at that particular place, and the demand made there, in order to give the holder a right of action; because the place is made part of the contract.

This rule is established in the English courts, although there are some decisions to the contrary, particularly the case of *Nichols vs. Bowes*, 2 Camp. 498; and *Wild vs. Renwards*, 1 Camp. 425, *note*. But neither in England nor in the United States is a formal demand necessary, if a bill or note is made payable at a particular bank, or at the house of a particular person, and such bank or person is the holder. In such case, it is a sufficient demand of payment, for the holder to examine the books of accounts, and a sufficient refusal, if it appears that the party who is to pay there, has no funds deposited. To make a formal demand of payment, under such circumstances, would be an idle ceremony. (*Saunderson vs. Judge*, 2 Hen. Blac. 509; *Bank of Wilmington & Brandywine vs. Coopers' Adm'r.*, 1 *Harrington's Rep.* 10, 14; *U. States Bank vs. Smith*, 11 *Wheat.* 171; *U. States Bank vs. Carneal*, 2 *Peters' U. S. Rep.* 543.)

In the last case the United States Bank at Cincinnati, was the holder of a promissory note made payable at the bank there. On the day when the note became due it was delivered to a notary, for protest, by the officers of the bank, after the usual banking hours were over, who informed the notary at the time, that there were no funds in the bank for the payment of the note. It was the unanimous

opinion of the Supreme Court of the United States, that this was a sufficient proof of a due demand of payment.

In the present case the two notes were endorsed by the plaintiff, John Allen, the payee, the one to H. F. Hollingshead & Co., and the other to Potts, Reynolds & Co., and both notes after several intermediate indorsements, were endorsed to John Torbert, cashier of the Farmers' Bank at Wilmington. The bank thus became the holder of the notes. The cashier having called on the notary, after banking hours, with the notes, informing him that the maker had no funds in bank, and requesting him on behalf of the bank, to protest them for non-payment, was a sufficient demand of payment and refusal on the part of the maker to pay; and no formal demand was necessary.

But suppose the notes were put in the Farmers' Bank merely for collection; that the plaintiff did not endorse them; and that he was the holder when they became due, and not the bank. Was it necessary to entitle the plaintiff to a right of action against the maker, to aver or prove a demand of payment? According to the rule before mentioned, established in the English courts, and relied on by the defendant, it was necessary. But various decisions in many of the States of the union are opposed to the rule; and although it may appear to be more in accordance with the contract of the maker, the rule has not received the sanction of the Supreme Court of the United States. In 11 *Wheat. Rep.*, in the case of the Bank of the United States vs. Smith; the action was brought by the plaintiffs, as indorsees, against the defendant, as indorser of a promissory note. Although the question did not directly arise in the cause, the court were strongly inclined to the opinion, that as against the maker of a promissory note, or acceptor of a bill of exchange, payable at a particular place, no averment in the declaration or proof at the trial, of a demand of payment at the place designated, is necessary. But where recourse is had to the indorser of a bill or note, such averment and proof, as a general rule, is required; because the indorser is not the original and real debtor, but only a surety. His undertaking is not general, like that of the maker of a note, or the acceptor of a bill; but is conditional, that if upon due diligence having been used against the maker or acceptor, payment is not received, then the indorser becomes liable. This due diligence is a condition precedent to the plaintiffs' right of recovery against the indorser. But the precise question was presented by the record in the case of Wallace, plaintiff in error vs. McConnel, defendant in error, in 13 *Peters' Rep.* 136.

The action in the court below, was upon a promissory note made by Wallace, defendant below, to McConnel, the plaintiff below, and expressed in the body of the note to be payable at the office of discount and deposite of the Bank of the United States, at Nashville. The declaration set out the note; and alleged the promise to pay at the place mentioned in the note, without averring that the note was presented at the bank, or that a demand of payment was made there. The Supreme Court of the United States, after adverting to the decisions in Westminster Hall, and to the American authorities, expressly decided the point, that in actions on promissory notes and bills of exchange, where the suit is against the maker of the note or the acceptor of the bill, and the note or bill is made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain the action. But that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defence to be pleaded and proved on his part. This decision, we consider, must settle the question.

The opinion therefore of this court is, that the arbitrators did not err in law, in awarding to the plaintiff, the amount of the aforesaid notes.

The next question is, did the arbitrators err in law, in awarding to the plaintiff, the amount of the orders? All of them are endorsed by the respective persons in whose favor they were drawn, and are for money, except four, which are for goods to a very small amount. It appeared before the arbitrators, that the amount of these several orders was advanced by the plaintiff for the use and benefit of the intestate; and that he thus became the debtor of the plaintiff for such amount. The orders therefore regularly endorsed, were properly admissible under the fourth count in the declaration, as evidence of money paid, and goods sold and delivered by the plaintiff, at the request of the intestate. And as the acknowledgment of the defendant of the correctness of the plaintiff's account, was good evidence under the fifth count of the declaration on the account stated with the defendant as administrator,—there was no error in law on the part of the arbitrators, in receiving proof of such acknowledgment.

The last exception charges misconduct and misbehaviour in the arbitrators, because, notwithstanding the defendant's written request, they did not set forth and annex to their award, the evidence taken before them, including copies of the notes, orders, and the plaintiff's account. To impose such an onerous task on arbitrators, seems un-

reasonable. It was not their duty to reduce to writing, the oral testimony received by them, and to annex it, and copies of the documents required, to their award; and it is no misconduct or misbehaviour in omitting or refusing to do so.

The court therefore discharge the rule; approve of, and confirm the award; and order judgment to be entered against the defendant, of assets, according to the agreement of the parties.

Rogers, for the motion.

Rodney and Gray, contra.



ZENAS B. GLAZIER vs. JAMES STAFFORD.

A certificated bankrupt, under the law of 1841, cannot be arrested and held to bail upon a subsequent promise to pay a debt due before the bankruptcy.

CAPIAS CASE. "Cepi corpus and bail bond." Rule, &c.

BOOTH, Chief Justice.—At the last term, a rule was obtained by the defendant's counsel, to show cause why the defendant should not be discharged on filing common bail,

The affidavit sworn to by the plaintiff states in substance, that the defendant being indebted to the plaintiff on the fifth day of May, 1842, at the city of Wilmington, in the county of New Castle, made his promissory note in writing bearing date the day and year aforesaid, and thereby then and there promised to pay to the plaintiff or order, one hundred dollars, for value received: that the said note is due and unsatisfied: that on or about the first day of May, 1844, at the said city of Wilmington, the defendant in consideration of the premises, promised the plaintiff to pay him the said sum of one hundred dollars with the interest due thereon: and that the defendant is justly indebted to the plaintiff, in the sum of one hundred and fifteen dollars; which is the amount of the said principal sum with its interest up to the 27th of November, 1844.

The defendant, after the said promissory note became due, was declared a bankrupt, by the District Court of the United States for the district of Massachusetts, under the provisions of the act of Congress, passed the 19th of August, 1841, entitled "An act to establish a uniform system of bankruptcy throughout the United States:" that on the 31st day of January, 1842, the defendant was discharged as a bankrupt, under the said act of Congress, by a decree of the said

District Court, and a certificate thereof granted to him by the said court on the 1st day of August, 1843.

The only question is, whether the defendant, after he has been declared a bankrupt and his discharge decreed and certificate allowed him by the District Court, can be arrested and held to bail upon a subsequent promise to pay a debt due before his bankruptcy.

The authorities on this subject are conflicting. In *Bailey vs. Dillon*, 2 *Burr.* 736, the bankrupt was discharged on common bail. *Wilson vs. Kemp*, 3 *Maule & Selw.* 595, was the case of an insolvent debtor who was discharged under the insolvent debtors' act, 54 Geo. 3d., and afterwards arrested upon a subsequent promise to pay an antecedent debt. He was discharged on filing common bail; Lord Ellenborough, C. J., remarking, that in the case of *Best vs. Barker*, 8 *Price* 533, (3 *Eng. Exch. Rep.* 452,) the question did not properly arise; because the motion was to set aside an execution against the defendant's goods, and not against his person. He recognizes the authority of *Bailey vs. Dillon* and says, that the Court of Common Pleas in *Ford vs. Chilton*, 2 *Blac. Rep.* 799, were of the same opinion. About one year after the determination of the King's Bench in *Wilson vs. Kemp*, the Court of Common Pleas, Gibbs, C. J., in *Horton vs. Moggridge*, 6 *Taunt.* 563, (1 *Com. Law* 484) decided, that an insolvent debtor might be held to bail upon a subsequent promise, made after his discharge under the insolvent act. And in 1820, the Court of Exchequer in *Blackbourn vs. Ogle*, 8 *Price* 526, (3 *Eng. Exch. Rep.* 448-9) decided, that if a bankrupt after having obtained his certificate, makes a promise to pay his creditor at a future day, the debt due to him before the bankruptcy, he not only revives the debt and renders himself liable to be sued for its recovery, but may be held to bail in an action founded on the demand revived by the subsequent promise. It seems that the court were at first very strongly disposed to discharge the defendant on common bail, on the authority of the cases of *Bailey vs. Dillon*, and *Wilson vs. Kemp*, which they considered forcibly in point; but afterwards, having been furnished with the cases of *Drew vs. Jeffries*, 8 *Price* 531, (3 *Eng. Exch. Rep.* 451,) and *Best vs. Barker*, 8 *Price* 533, they refused to discharge the defendant. In 1822, the question was again raised in the Court of King's Bench, in the case of *Peers vs. Gadderer*, 1 *Barn. & Cres.* 116, (8 *Com. Law* 36,) where all the authorities were collected. The Court, Abbott, C. J., after remarking that the case of *Wilson vs. Kemp* was rightly decided, determined, that the bankrupt could not be arrested upon a subsequent promise; because the words of the

statute 5 Geo. 2, c. 30, sec. 7, directed that the bankrupt, if arrested for any debt due before the bankruptcy, should be discharged on common bail. The court said that it was a question of fact for the jury to decide, whether the bankrupt had made himself liable by a new promise; and until they have decided that question against him, he was entitled to be discharged.

This decision in *Peers vs. Gadderer* may be considered as settling the question in England; and certainly it is in accordance with the language, object and intent of their bankrupt law, which in this respect is defeated, if a defendant is to be arrested and held to bail for a debt due before the bankruptcy, upon a subsequent promise to pay it, without any new consideration. The present case is one of that description. It is like the case of a new promise reviving an old debt barred by the act of limitation; and differs essentially from the case of a bankrupt, who after his discharge, gives a bond or other security in payment or satisfaction of a debt existing prior to the bankruptcy; or makes a contract upon a new and sufficient consideration, to pay such antecedent debt.

Throwing out of view all the English decisions, and adverting to the late bankrupt act of the United States, we are left in no doubt on this question. The fourth section in substance declares, that every bankrupt who bona fide surrenders all his property and complies with the orders of the proper court, shall be entitled to a full discharge from all his debts, to be decreed by the court, and to a certificate thereof, to be granted by such court. And that such discharge and certificate, when duly granted, shall in all courts of justice, be deemed a full and complete discharge of all debts, contracts and other engagements of the bankrupt, provable under the act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and be conclusive evidence itself in favor of such bankrupt, unless impeached by fraud, &c.

The opinion of the court is that the defendant be discharged on filing common bail, and the rule be made absolute.

Rogers, for the rule.

Gilpin and *Johnson*, contra.

WILLIAM RUNYAN vs. WILLIAM R. DICKENSON.

On a certiorari to a justice's judgment rendered by confession, the court refused to allow the defendant to contradict the record by denying the confession of judgment.

CERTIORARI to Justice Leonard.

The record set out an action of Dickenson *vs.* Runyan "on a promissory acknowledgment for \$50;" *capias* issued; the defendant brought forward, and by his request the case was continued to another day, when "the defendant appeared and confessed judgment for \$50 debt, and fifty-six cents costs of suit. F. Leonard." After the judgment the defendant made two payments to the justice, on the judgment, of \$10 each; and afterwards took out a *writ* of certiorari, and the justice paid him back the \$20.

Whitely, for defendant, assigned as error in fact supported by affidavit "that the defendant did not confess judgment for the sum of \$50, as stated by the said justice," and moved for leave to contradict the record on this point by the production of proof.

Motion for leave to contradict the record in this respect refused, and judgment affirmed.

Whitely, for Runyan.

Gilpin, for Dickenson.



SARAH HAINES vs. JAMES WISE.

Quere. What is the law of trespasses by road cattle? Is the owner of cattle turned upon the public roads liable for all trespasses on private property; or only upon such as is enclosed by lawful fence?

REPLEVIN for a cow. Narr., in the *detinuit*. The defendant avowed that he took the cow damage feasant. Replication and issue.

The proof in the case was that plaintiff's cow with others, broke into the defendant's garden, in the town of New Castle, and destroyed his cabbages. He took her up and sent notice to the owner, who refused to go for her, but sued out a *writ* of replevin.

Mr. Wales, for the plaintiff, contended: 1st. That it was lawful for the owners of cattle to suffer them to run at large. 2d. That the charter of New Castle provides a specific remedy for cattle trespassing, and requires them to be put in the public pound. (*Dig.* 625.)

3d. That it was incumbent on defendant in this case to prove that he had sufficient fences and gates, and that the breach was actually made by *this* cow. The evidence was that she was there with two others.

It has been decided by Judge Parsons, (Massachusetts,) that there is no common law in relation to fences. It is all the subject of statutory enactments.

Mr. Rogers replied, that the act of assembly referred to was obsolete. It had never been used. There had never been a public pound or pound-keeper. But if it were in full force it was only a special remedy, to be used or not as the party pleases; leaving him still his choice of the several remedies at common law.

But this defendant, injured by the trespassing cow, was not seeking to recover damages. He was only defending himself against a claim for damages for taking up a cow which was eating up his garden. He had shown a proper and legal defence to such an action by pleading and proving that he took the cow damage feasant.

He insisted, moreover, that by the common law, every man's land was enclosed by an ideal, invisible fence, sufficient to protect it against trespassing cattle, or to afford him the means of redress for all injuries thence accruing. No one has the right to turn his cow out on the public without being answerable for all the damages she may do.

The Court declined expressing an opinion on the other points of the case, as it was only necessary to state that the avowry was sustained if the evidence was credited; the issue being whether the cow was taken doing damage.

Verdict for defendant.

Wales, for plaintiff.

Rogers, jr., for defendant.



In the matter of JOHN MILES, Adm'r. of WM. T. SMITH, deceased.

In the settlement of administration accounts the Register acts under sec. 21 of Art 6. of the Constitution, and the appeal is to the Orphans' Court, and not to the Superior Court.

APPEAL from the act and decree of the Register of wills for New Castle county, on the settlement of an administration account.

The record showed a citation by the register to the appellant re-

quiring him to settle his administration account on the estate of Wm. T. Smith, deceased ; that he appeared personally and by counsel, and at his request the register postponed the matter several times, until he at last neglected to appear altogether : whereupon, "the register, having the vouchers and materials for settlement before him, proceeded to settle and pass the account, and charged him with the full amount of the debts due the deceased as returned and filed in the register's office," from which he appealed.

The exceptions were 1st. That the acts and proceedings of the register were illegal and unconstitutional. 2d. That the account settled and decreed by the register is not the account of the administrator. 3d. That the register did not carefully examine the particulars of the said account with the proof thereof, in the presence of the administrator. 4th. That he settled the account of his own motion, and it was not filed or furnished by the administrator. 5th. That the account was not settled according to law ; and the proceeding was irregular and illegal. 6th. That the register charged the administrator with desperate debts, and did not allow him proper credits, &c. &c.

Rogers, for the appellant, contended that the register could not of his own motion, state and settle an administration account without the presence of the administrator ; but should compel the administrator by attachment and imprisonment to settle. (*Dig. 227, § 15; 8 vol. 17.*)

Gray and Rodney, contra, contended that the register, having had the administrator before him with his vouchers and papers, had the power to settle the account though the administrator withdrew himself from the jurisdiction, and refused to complete the account ; and that this proceeding being under sec. 21, and not under sec. 22, of Art. 6, of the Constitution, the appeal was not to this court, even if there was error in that mode of settlement.

The Court dismissed the appeal for want of jurisdiction ; considering that in the matter of settling administration accounts where there was no adversary proceeding, no parties, and no "litigation of a cause," the proceeding was under sec. 21 of Art. 6, of the Constitution, and not under sec. 22 ; and that the appeal was by way of exceptions before the Orphans' Court, and not to this court. (*3 Harr. Rep. 433, Robinson vs. Robinson.*)

Appeal dismissed.

Rogers, for appellant.

Gray and Rodney, contra.

NATHANIEL WOLFE *vs.* BENJAMIN WHITEMAN.

On a note payable on or after sight, the act of limitation does not begin to run until a demand is made.

A presentment with a request of payment, or a new note, is a good demand.

THIS was an action of assumpsit on a promissory note, dated August 29th, 1837, payable thirty days *after sight*. The defence was the act of limitation, and set off of a book account, beginning in 1825, and ending in 1830; to which the plaintiff replied the act of limitation. The plaintiff proved the execution of the note and a presentment, about August 20th, 1843, for payment or a new note, with a view to prevent the running of the act.

Mr. Wales, for defendant, contended that this was not a lawful presentment, the demand being in the alternative; that such presentment avowedly for the purpose of saving the bar of the statute, implied a previous presentment at or about the date of the note, as the danger of such bar could only exist on such supposition; and if the jury believed there had been such previous demand, at so early a date, the note was now barred.

Mr. Gray, for plaintiff, replied that this note being payable thirty days *after sight*, the cause of action did not occur, and the statute could not begin to run until a demand; that there was no evidence of a presentment previous to August, 1843; and that the demand for payment, or a new note, was a lawful presentment: of which opinion was the court; and the matters of discount being clearly barred by the statute, the plaintiff had a verdict for the amount of the note with interest from the time of presentment. (*Chitty on Cont.* 311; *2 Taunt.* 323.)

Gray, for plaintiff.

Wales, for defendant.

SAMUEL SAUNDERS *vs.* RICHARD J. MILLWARD, WILLIAM MILLWARD and COLLINS TATMAN.

A constable having made a lawful levy on goods, is justified in taking possession of them afterwards, by force if resisted.

TRESPASS de bonis asportatis. Pleas, not guilty; justification and license. Replication to plea of license; excess.

The action was against defendants for entering plaintiff's house and taking away his goods forcibly.

The proof on the part of the plaintiff was that the defendants came to the house and demanded admission, which was refused by plaintiff's wife; that they threatened to break open the doors, and the defendant Tatman did break a pane of glass and run his arm through the window. The defendants were very violent; frightened the children; and threw the goods out of doors.

The evidence for defendants was that Richard J. Millward had a judgment and execution against Saunders, which was placed in the hands of Tatman, a constable, who went to plaintiff's house to make a levy; after taking the inventory, Tatman went with Saunders to a neighbor's for the purpose of getting security for the forthcoming of the goods: he failed in this, and was then told by Saunders to go back and take the goods, in the attempt to do which he was resisted by plaintiff's wife.

Mr. Guthrie, to the jury, contended that this was a case of excess and abuse of authority which rendered the defendants liable as trespassers for breaking the house and other acts of violence. (*1 Smith's Leading Cases* 39; *Semayne's Case*.) That there was no evidence of a legal levy of the execution, and the officer never had legal custody of the goods. But even if there had been a levy, the subsequent violence made them trespassers *ab initio*. That the license was no excuse; it was a permission to take goods peaceably; not to break the house. The doing so was an excess of the license. He claimed exemplary damages.

Mr. Gray, contra, contended that there was a lawful levy made without violence, and a subsequent taking possession of the goods before levied on, with the direct permission of plaintiff, and that the violence was occasioned by the plaintiff's wife.

The Court:

HARRINGTON, Judge.—It appears by the evidence that these goods were taken by the defendants, and there was some degree of violence. The jury must determine whether the violence used was justified or excused, and how. The defence set up is: 1st. A justification as a public officer in execution of lawful process of execution. 2d. By a license from the plaintiff himself.

Every man's property, especially that which is in his house, is under the protection of the law; and the taking possession of it without his consent or by due warrant of law, and in the mode allowed by the law, is a trespass. It is for the defendants in this case there-

fore, to excuse the act of taking possession of this property by the permission of the plaintiff; or to justify it by authority for making the levy in the first instance, or the right to resume possession of property previously levied on.

A public officer has no right to break open outer doors to make a levy. (3 *Harr. Rep.* 288.) If a levy has been once lawfully made, he may break doors to carry away the property or effect a sale. (2 *Ibid.* 495-6.) Yet if an officer be guilty of oppression under color of his process, he would be liable to exemplary damages. (2 *Ibid.* 486.)

Verdict for defendants.

Guthrie, for plaintiff.

Gray, for defendants.



JAMES MERCER'S CASE.

The act of February, 1845, "concerning non-resident insolvent prisoners," is constitutional.

Ex parte James Mercer, jr. Petition for the benefit of the insolvent act of 1845, by a non-resident, imprisoned at the suit of Jesse Sharpe, a citizen of this State.

Mr. Wales, for the imprisoning creditor, opposed the discharge on the ground that the act of 1845 was unconstitutional. 1st. Because it is confined solely to non-residents, and gives them privileges and exemptions not enjoyed equally by our own citizens. 2d. If this act be constitutional it is invalid in relation to a *previous* contract, and as between citizens of different States. (3 *Story's Com.* 256; 12 *Wheat. Rep.*)

Caulk, contra, cited, 4 *Wheat.* 122; *Ingr. Ins.* 176; 1 *Harr. Rep.* 466; 3 *Ibid.* 271; 3 *Story's Com.* 252.

The Court ordered the petitioner to be discharged.

HENRY WEISER vs. ABRAHAM BOYS, Sheriff, PHILIP PLUNKETT et al.

A woman may by an ante-nuptial contract, secure her own property against her husband's debts; but after acquired property, though the proceeds of the property so secured, and of her own labor, belongs to the husband.

Quere. If such property can be secured to the wife?

THIS was an action of replevin for a pipe of gin ; half pipe of wine ; pipe of brandy and other liquors, seized and taken in execution as the property of Lewis Heerz, (or Hart,) by Boys, the sheriff, at the suit of Plunkett and the other defendants.

The property was claimed by plaintiff as the trustee of Christine, the wife of Lewis Heerz, under a marriage contract transferring all her personal property (per schedule) to Weiser, in trust for the separate use of the said Christine for life, as if she were sole, so that the same should not be subject to the debts or contracts of her intended husband. It appeared by the evidence that when this contract was made, Christine Kercher was in the possession of the property, being a hotel and fixtures in the city of Wilmington, a schedule of which was appended to the deed, comprising household furniture, liquors, including a pipe of gin and of brandy and half pipe of wine, casks, and other appendages of a public house. After the marriage with Heerz, (who had no property,) the establishment was kept up and the same business continued, Mrs. Heerz being the active person in the establishment and doing most, but not all of the buying and selling for the bar. The house was licensed in the husband's name. Heerz bought and sold occasionally, but not often, being much from home, and in Europe. The wife frequently made bills in her own name ; sometimes articles bought by her were charged to the husband. When at home he managed the property acquired by the marriage, as his own, and made large building and other contracts in his own name ; the tavern business he left principally to her management. The bills for the liquors replevied were made out in the name of Weiser, as trustee for Christine Heerz, and ordered by her. Weiser did not reside in the State.

The plea was property in Lewis Heerz, and that the goods were taken by the sheriff under a domestic attachment at the suit of Plunkett and others against him.

The question was whether this property was protected by the marriage contract; from the debts of the husband Heerz, (commonly called Hart.)

Whitely, to the jury, insisted that Lewis Heerz, after holding himself out to the public as proprietor of this hotel for many years, buying and selling on credit, ought not to be permitted to answer the demands of his creditors under a pretence that his property belonged to Weiser, as a trustee of his wife.

The deed of trust when valid, must be strictly followed. Mrs. Heerz had no authority under this deed to act for herself; when she acts it is for her husband; what she does under the trust deed must be done by her trustee, Weiser. And for the property, even that mentioned in the schedule, if it never went into the possession of the trustee, but remained in the possession of the wife or husband, who used them as his, it is not protected by the marriage contract. (2 *Tidd's Prac.* 1049; 3 *Durf. & East* 618.)

He said it was not necessary to show that L. Heerz bought this identical liquor; but if he was in possession of that tavern as the landlord or owner, so acting and so recognized, the possession was sufficient evidence that it is his property.

Wales, for plaintiff.—It is competent for persons previous to a marriage to enter into a contract that all the wife's property, personal as well as real, shall be settled upon her, and not subject to her husband's debts. And it does not matter whether the property goes into the trustee's possession or remains in the possession of the wife. The property remains secured to her by the deed, subject to her control and disposition and no other person's.

Then how is the property now in dispute to be considered? Did Lewis Heerz buy or pay for it? On the contrary, we have shown that it was bought by Mrs. Heerz, and the bills all made out in her name. The agreement makes Mrs. Heerz separate and distinct from her husband in respect of her property. Her possession is all along consistent with that of her husband.

Whitely, in reply.—The possession of this property by Lewis Heerz was inconsistent with the deed of trust, and makes it liable to the husband's debts. If the wife, being an innkeeper at the time of the marriage contract, continued her own business separate from the husband and entirely distinct from him, her property might not be liable to the husband's debts; but carrying her property into the husband's business and into his possession and use in the course of his business, it is no longer protected by the marriage contract, but is the husband's property and to be treated as such.

The Court:

Booth, Chief Justice.—By the law of the land husband and wife

are considered as one. Her existence, in a legal sense, is merged in his. She acts with him and for him, and has no authority or will of her own. It is the policy of the law to regard the husband as the head of the wife, keeping her out of view as much as possible, and presenting him as the only responsible member of the family. Nevertheless, a woman may, before marriage, with the approbation of the husband, and by the intervention of a trustee, make a valid assignment of her property, which will vest it in the trustee and protect it from the debts of a husband. And this is not inconsistent with the principles before mentioned, for the property is changed by the act of the woman before marriage, and is valid as against the husband by his own assent; otherwise it would be fraudulent and void.

In relation to the scheduled property therefore, or such property as is expressly covered by the ante-nuptial contract, it would be protected against the husband's debts; but it is different as to after acquired property, even the proceeds of the wife's labor; which the contract does not embrace. This contract, making no provision in relation to the proceeds or products of the scheduled property, covers only the property in the schedule mentioned. If that were levied on for the debts of the husband, the contract would protect it. And possibly the increase or avails of property so secured for the separate use of the wife, and employed by the terms of the contract in the separate and distinct business of the wife might be protected. Of this we give no opinion. If it can be so it ought to be regulated by law to prevent frauds on creditors or others. But it is apparent from this deed that there was no intention to provide for the carrying on of a distinct business by the wife, as agent of the trustee, and with the trust property; nor does it appear that she did carry on such business; on the contrary, her husband took out the license and kept the house in his own name, and held himself out to the world as the proprietor. And as to the services of the wife there, and the prominence she held in the establishment, these are all consistent with her husband's keeping the house, for she acts as his servant. So in relation to purchases made, even when the bills are made out in her own name. There is no evidence that these purchases were made with the trust funds, or otherwise than with her husband's funds, and by his command. He, at all events, would be responsible for them; being bought for and consumed in his house, and about his business.

Verdict for defendants \$420.

Wales, for plaintiff.

Whitely, for defendants.

ROBERT BURTON *vs.* THE PHILAD'A., WILMINGTON & BALTIMORE RAILROAD CO.

The railroad company is liable for injuries resulting from the negligence of its agents or servants.

It has the right to pass through Wilmington at the usual speed, and with the necessary noise, taking due precaution to avoid danger. If horses are frightened by the escape of steam, or other necessary noise, the company is not responsible.

Negligence is a question of fact for the jury.

The court will not set aside a verdict founded on conflicting evidence, though they would have drawn a different conclusion from the jury.

THIS was an action on the case against defendants for negligently running over plaintiff's horse with a locomotive engine and cars, and killing him. The declaration contained several counts; the plea to all of which was, not guilty.

The plaintiff was upon the wharf at Wilmington, with a pair of fine young horses attached to a cart. They were not well broke, having been but a short time in use. The engine with a train of cars was leaving the station-house with considerable noise of escaping steam and ringing of bells, by which plaintiff's horses were frightened, and ran across the track in front of the engine. One of them was killed.

There was a contrariety of evidence in relation to the negligence of defendants' agents, and their skill, and of the rate of speed at which they were going, as well as of the immediate cause of the collision; the defendants contending that it was owing entirely to the negligence and want of prudent caution in plaintiff, and the character of his horses; the plaintiff contending that the train of cars was going at an improper speed and with unnecessary noise; that the conductor or brakeman of the engine deserted his post; and that the view was obstructed by cars improperly placed near the road, so that the train came suddenly upon plaintiff, and gave him no time to check his horses.

The principles of the case are presented in the charge to the jury.

HARRINGTON, Justice.—The gist of the action is the negligence of defendants' servants, for which they are liable as for their own negligence; want of due care or other improper conduct; producing the injury complained of. (2 *Kent Com.* 259-60, n.; 1 *Blac. Com.* 431-2; 6 *Term Rep.* 659; 2 *Hen. Blac.* 442; 2 *Harr. Rep.* 67, *Ibid* 443, 481.)

The defendants have made a railroad under authority of law, which runs through the city of Wilmington, and upon which it is lawful

and right for them to use locomotive engines propelled by steam, with all the incidents of that kind of conveyance; they being responsible, as individuals or others would be, for the exercise of *due care* and prudence; and being liable for injuries done to others by any negligence or illegal conduct on their part.

Being authorized to use steam as the propelling power of these engines, the smoke and noise of steam escaping are indispensable, as well as the noise occasioned by the cars and usual notice bells; and the company would not be liable for mere accidents arising from fright to horses occasioned by these noises. In the exercise, however, of the right to use this steam power in passing through a populous town, the company are bound to use all due precaution to avoid danger to others, and to travel at a rate of speed prudent under the circumstances. This prudent and proper rate of speed is either regulated by law, or by the usual and customary speed. There has been no evidence of any legal regulation, though an ordinance of the city has been referred to on the subject; it will be for the jury to say, on the evidence, whether the defendants were going with their train at the usual and proper rate of speed; whether they abused in any manner their lawful right to use this noisy and powerful agent of steam; or whether they were guilty of any negligence or misconduct, which occasioned the injury of which plaintiff complains. If they were not guilty of any such negligence, the defendants cannot be liable for this injury to plaintiff's horse, which must be regarded as either accidental, or to be attributed to some negligence of his own, or want of prudence in being in that position with badly broke horses; and he must bear the loss.

The plaintiff contends that the defendants were guilty of improper conduct, or negligence in one or more of these three particulars, namely: in going at an unusual and improper rate of speed; in the brakeman leaving his proper position, and abandoning his duty, at the time of the collision; or from improperly placing their burden cars, not in use, in a position that obstructed the view of persons or horses approaching, and thus increased the danger of accidents.

On the first point the jury will recur to the evidence of Buzines and of Rickards for the plaintiff; and of Young and Lyons on the part of the defendant, as to the rate of speed as well as the general evidence of the other witnesses.

2. Were the brakemen and other persons connected with the driving this engine in their proper places performing their duty; or did they neglect any thing which they ought to have done. The

general evidence is, that the collision was almost instantaneous, but that the engine was reversed and the break put down at once; though, according to the evidence of Mr. Gill, one of the brakemen got off about the time, or soon after the stroke; and Mr. Lyon, who was the brakeman, says he remained on the brake as long as he dared. It will be for the jury to say whether from this or any other evidence this collision was occasioned by the abandonment of duty, or misconduct of the brakeman, or any other agent of the railroad company.

3. The remaining question is, whether the company were guilty of negligence in obstructing the view by their cars. Certainly not, if these cars were standing upon the company's premises, for they would have the right to place not merely cars, but to build houses on their own premises, which would obstruct the view, and might increase the danger of accidents from this cause, unless other persons should increase their vigilance and prudence in proportion to the danger. But if these cars were standing in any place on which the defendants had not the legal right to place them, and the collision with plaintiff's horse was occasioned by the obstruction of the view thus produced, the defendants would be liable for this misconduct, if any such were proved.

Negligence is a question of fact for the jury, and also the amount of damages; which ought to be proportioned to the loss, namely, the value of the horse; which was proved to be one hundred and fifty dollars.

The jury rendered a verdict for fifty-one dollars; and there was a motion by defendants, and a rule to show cause why a new trial should not be granted, on the ground that the verdict was against law and evidence.

After argument the rule was discharged, the court saying, that though they did not approve of the verdict, it was the result of conflicting evidence which was submitted to the jury to be weighed by them; and the amount of the damages was equally within their province.

Patterson, for plaintiff.

Wales, for defendants.

HENRY W. STONE *vs.* WM. HEMPHILL JONES.

After judgment in attachment and auditors appointed, payment of the attaching creditor will not arrest the proceeding, which may go on even without substituting another plaintiff.

DOMESTIC attachment issued to November term, 1843. Returned "attached goods as per inventory and appraisement, May 9, 1843, and afterwards attached lands as per description."

May 18th, 1844, on motion, judgment, and auditors appointed by the court.

After the appointment of auditors the judgment of the attaching creditor, Stone, was satisfied, and no further proceedings were taken under this attachment until May term, 1845, when

Patterson, for Craige, another creditor, moved the court to substitute his client for the above plaintiff, in order that the distribution might take place. He referred to *Dig. 47, sec. 4.*

Whitely, for other creditors, wished the proceedings to go on, but objected to the motion substituting any one of the creditors, as that would give such creditor a double share in the distribution, without any special diligence on his part.

The Court said the proceedings under the attachment are not necessarily stopped by the payment of the claim of the attaching creditor, after judgment and auditors appointed. The other creditors have an interest in the proceedings, as they may not issue any second writ of attachment. A substitution is not necessary, as in the case of the death of the attaching creditor; the proceedings may still be conducted in his name; and the auditors have leave to report to the next term.

Order to auditors to proceed.

Patterson, for Craige.

Whitely, for other creditors.

COURT OF ERRORS AND APPEALS.

JUNE TERM,

1845.

JAMES G. GREGORY & Co. vs. EDWARD T. BAILEY'S Adm'r.

CHARLES H. ROGERS vs. THE SAME.

Lottery tickets are properly chargeable in a book account.

The act requiring vendors of lottery tickets to take out license, has reference to retail vendors, and not to the grantees under a lottery law, nor to their assignees where there is a power to sell the entire scheme.

In assumpsit the plaintiff may recover under the count on an account stated, on proof of the admission of a general balance, without going into the items of the account.

The prohibition to sell lottery tickets without license does not invalidate the sale; but subjects the party to a penalty.

The acting partners of a firm must all join in making probate of a demand against a deceased person.

Dormant or retired partners, or partners permanently absent from the country, need not join in making probate.

Where a firm here has a distinct branch in another country, probate by the acting partners of the house where the contract was made is sufficient.

A contract for the purchase of lottery tickets entered into by a retail dealer in this State, with a wholesale dealer in New Jersey, ordering the tickets to be forwarded from that State to this, is a legal contract under our laws, the tickets forwarded being in lotteries authorized by New Jersey or by Congress.

QUESTIONS reserved by the Superior Court in and for New Castle county, for hearing before all the judges in the Court of Errors and Appeals.

Heard at the June term, 1845, before the full court; Johns, jr. Chancellor; Booth, Chief Justice; Harrington, Milligan, and Hazard, Judges.

The actions were in assumpsit for goods sold and delivered to the defendant's intestate, being for the price of certain *lottery tickets*. There was a special count for the price of lottery tickets sold; and a count on an account stated with the intestate. The pleas were non-assumpsit, payment, discount, set off, and limitation.

At the trial below the plaintiffs offered in evidence a copy of their account, with a probate by *one* of the members of the firm. It was objected to on the ground that the probate of one co-partner was not sufficient. (*Dig.* 226, § 14.) It was said to have been so decided in the late Supreme Court, or Court of Common Pleas ; in a case of Scott et al. vs. Hamilton's administrators.

The plaintiffs' counsel contended that the probate of one co-partner was the probate of all. A co-partnership is not an aggregation of individuals, but a unity. As such, it acts by any member, who can bind or release for the whole. So the probate of one is the act of all. They had no knowledge of the case cited. The act of assembly says that "the person holding the debt" shall make the probate. Here is no person; but a legal abstraction, composed of several persons, capable of acting by any one. Why should it not act in this matter, as in all others ?

The court has looked beyond the mere letter of the act to carry out its spirit, and held that a *cestui que use*, and not the legal holder, was the person to make probate. (*2 Harr. Rep.* 509-13.) It looks to the party entitled to receive the debt and give an acquittance for it. Any co-partner is such a party. The partnership is the legal person "holding" the debt.

The defendant's counsel replied that the act of assembly was designed to protect the estates of deceased persons, against claims of which the payment might not be within the knowledge of the administrator. It is but reasonable that whoever makes a claim against a deceased's estate, should verify his claim by affidavit that it is just and unpaid. And the estate cannot derive just protection; such as was designed by the act; without the oath of *each* member of the partnership : for either member may have received payment.

The court below, thought the affidavit sufficient. They said one partner may take out an attachment on his affidavit ; may file an affidavit to hold to bail ; and may do any other legal act for the firm. The partner making probate, does so from the books, and this is the security of the estate. They thought it would be unreasonable to require that each member of the firm should make the probate ; in many cases it would be impossible. Co-partnerships often exist with members widely separated ; often with dormant partners ; and it would be impossible to have the affidavit of each co-partner. The same construction has been practically placed on the act about promises and assumptions in the proof by one partner to make the books evidence.

Plaintiffs then proved an admission by the defendant, Bailey, in the summer of 1842, of a balance appearing due on an account stated between them. The account was for lottery tickets sold Bailey, in lottery schemes authorized by the States of Delaware, Maryland, Virginia and New Jersey, and by the Congress of the United States. This evidence was objected to until the laws authorizing these lotteries, respectively, were proved.

Copies of acts of the legislatures of Maryland, Virginia and New Jersey, exemplified under the great seal; were then put in evidence.

The pamphlet laws of the United States were then offered to prove the Alexandria lottery scheme, and objected to as not being properly authenticated. The printed pamphlets were admitted by the court, as the paramount law of the land, promulgated in the usual way; they being published at Washington, and purporting to be by authority.

It was further objected to the evidence of defendant's indebtedness, that the demand arose on a sale of lottery tickets which is prohibited by law, without a license. It was replied: 1st. That proof of an admission of a balance due on an account stated, precludes the entering into any evidence in opposition to the items of such an account. 2d. That the sale of lottery tickets without a license, is prohibited only under a penalty, and the sale not being declared void, the vender can recover the price. 3d. That the act of 1833, (8th vol., 243,) extends only to retail dealers, and not to contractors or others selling by wholesale to retailers.

Passing over the first two points, the court below ruled the third for the plaintiffs, and admitted the evidence, which showed an admission by E. T. Bailey, on 1st of April, 1843, of a balance of \$412,96, to be due on an account stated between plaintiffs and him, for lottery tickets purchased of them.

A verdict was then taken for plaintiffs, by consent, subject to the opinion of the court in banc on the law of the cases.

The questions reserved were: 1st. Whether one of several co-partners could make a good probate? 2d. Whether an admitted balance on an account for lottery tickets sold by plaintiffs, as assignees of a lottery grant for the benefit of Delaware College, was admissible in evidence, without proof of a license to sell lottery tickets; and whether such evidence could lawfully extend to tickets in United States or New Jersey lotteries, sent to defendant's intestate, from New Jersey, on his orders? 3d. Whether evidence should be required or admitted of the items of such account, after proof of an

admission of a balance due on the account stated? 4th. Whether plaintiffs could recover under the count on an account stated, on proof of such admission, merely? 5th. Whether they could recover for lottery tickets in schemes authorized by Congress, or by the States of New Jersey, Maryland, or Virginia, or of this State? 6th. Whether lottery tickets were properly chargeable in a book account? 7th. Whether a sale made by plaintiffs, in the State of New Jersey, to defendants in Delaware, of lottery tickets to be vended in Delaware, could be recovered upon here, in reference to the law which ought properly to govern the case.

The argument in banc was made by *Whitely* and *Rogers*, for plaintiffs; and *Gilpin* and *Wales*, for defendants.

Whitely.—1st. Lottery tickets are properly chargeable in a book account. I consider this as settled. The law authorizes these lotteries; it authorizes the sale of lottery tickets in any lotteries, foreign, or domestic, as a business; and therefore, makes the things thus sold in the course of lawful business, the proper subject of a book entry. (8th vol. 355, 362, 243; 1 *Harr. Rep.* 346; 2 *Ibid.* 34.) The intrinsic value of an article is not the principle upon which things are or are not so chargeable. The purchaser always sets a value on what he buys, and he is the judge.

2d. Gregory & Co. were not bound to take out a license, under the act of assembly. That act has reference only to retailers. They are proprietors of the lottery grant, and stand in the place of the managers in the law named. Any act requiring them to take out license would be void, for the lottery law authorizes these managers to sell without license. (8th vol. 243; 9th vol. 561; 1 *Harr. Rep.* 346.)

3d. Can one of several partners make a probate? The reason for requiring a probate is the prevention of fraud; that the administrator should have the sanction of the oath of the party claiming, before he pays. (1st vol. 420.) The oath of one partner effects this. He swears for all, and from the books of the firm. He is the person holding the debt. His credits admitted, bind the firm; he may release, discharge, or collect the debt. May he not make probate that the debt is due? The probate proves nothing, (3 *Harr. Rep.* 421,) or there might be more reason to require it to be made by all the partners. A different construction makes it necessary to join dormant or absent partners in a probate, where the former is not even necessarily joined as a plaintiff in the case. The argument from inconvenience proves that this cannot be necessary. This is a good ground of legal judgment. (3 *Harr. Rep.* 219.) There are often part-

ners residing in foreign countries, in which case they might as well give up a claim as to attempt to get a probate by all. And the foreign partner, who knows nothing of the account, could not swear to it. If there were three members of a firm, one dead and one bankrupt, the surviving partner must be joined by the administrator of the dead partner, and the assignee of the bankrupt. This could not be intended. The act of assembly requires probate by assignor and assignee where the assignment is made *after* the death of the debtor; leaving assignments before the death operative and recoverable on the probate of the assignee alone. Yet the opportunity of fraud is much greater in that case than in the case of probate by one of several partners. An affidavit to hold to bail may be made by one of several partners; and the objects of that, and a probate, are the same. (2 *Bos. & Pul.* 390.)

4th. On proof of an admitted balance on an account stated, the plaintiff shall be entitled to recover without proof of items; and even if the articles sold were not properly chargeable in account, or were sold without a license, if a license were necessary to enable him to recover on the general counts. (1 *T. Rep.* 42, n.; 1 *Ch. Plead.* 308; 2 *T. Rep.* 480, n.; 3 *Ibid.* 232; 11 *East.* 180; 8 *Taunt.* 688; 15 *Eng. Com. Law* 40; 21 *Ibid.* 29; *Chitty's Bills* 636-45; 2 *Mod. R.* 44; *Hob. R.* 88.)

5th. The New Jersey law cannot be noticed by the court, unless it had been pleaded. The defendant cannot give it in evidence without pleading it; nor the plaintiff without averring it in his narr. (3 *Harr. Rep.* 77, 436; 1 *Ch. Pl.* 223; 14 *Johns. Rep.* 337; 1 *Hen. Blac.* 123.) This law is the only matter relied on in the case Rogers *vs.* Bailey's administrator.

6th. But if the court will notice this law; the sale was in Delaware and not in New Jersey, and it was no violation of the law of Jersey. Bailey kept a retail office in Wilmington, and plaintiff's a wholesale office in Jersey. The plaintiff's forwarded packets of tickets to defendant, in Wilmington, on his orders, and delivered them to him there.

7th. If the contract was made in the State of New Jersey, as it was made with a view to performance in Delaware, it is to be governed by the laws of Delaware, and not of New Jersey. The law of the place where the contract is to be performed governs. (*Story's Conf.*, sec. 196; *Ibid.* 278, a. 280; 2 *Ibid.* 305; 2 *Kent Com.* 393-4, 459; 1 *Johns. Rep.* 94; 4 *Ibid.* 285; 8 *Ibid.* 189; 17 *Ibid.* 511; 3 *Mass. R.* 77; 13 *Ibid.* 20-3; 4 *Cowen Rep.* 510, n.; 6 *Peters' Rep.*

203.) The sale was by wholesale in New Jersey, which was lawful there; with a view to retail in Delaware, which is lawful here; though it would be unlawful in New Jersey.

8th. The New Jersey law does not invalidate the contract, but only lays it under a penalty which cannot be executed here. A penal law is always local, and can have no extra territorial effect. (*14 Johns. Rep.* 340; *1 Hen. Blac.* 135; *Coupl.* 343; *Story's Conf. Laws*, sec. 620.) The laws of New Jersey prohibit the sale of dry goods, without license. Would that be a good defence to an action brought here for the price of the goods?

Gilpin and Wales, for defendants.—1st. Are lottery tickets properly chargeable in a book account? They are neither goods, wares, nor merchandize; and are of no intrinsic value. Brokers charge a commission for endorsing notes; for hiring their credit. This is a business. Would it be the subject of book charge? Money lent or advanced is not. So that it does not follow because the act legalizes the business, it facilitates it by making the tickets chargeable in a book account.

2d. The plaintiffs cannot recover on a sale of lottery tickets without license. The act of assembly, (8th vol., 243-4,) prohibits the sale without license; and applies to wholesale as well as retail dealers. But they say that Gregory & Co. are the purchasers of the whole lottery scheme from the State's grantees; a purchase made prior to the act of 1833: and that the legislature has not the right to require these grantees to take out license. The State has the right, under the taxing power. (*3 Harr. Rep.* 141.) It taxes inn-keepers, retailers, pedlars, &c. &c., and why not lottery ticket venders?

3d. A probate by one partner is not sufficient. "The person holding the debt" shall make probate. (*Dig.* 226.) What for? To prevent fraud; to protect the decedent's estate. In principle all who have a right to receive should swear that they had not received. If there be more than one plaintiff, how can the conscience of one answer for another, or protect the estate against the fraud of the other? The law meant to protect the estate by an application to the conscience of every one who could discharge the same. The practice of the bar here is uniform on this subject; for co-plaintiffs all to make probate. And is there any difference in this respect between joint plaintiffs and partners? Both must sue; either may release. The legal rights of both are the same in every respect. In either case they are co-partners; in the one case using the name of the firm, generally, but not necessarily. Co-partners may exist as a

partnership in any other name, or without any name. The argument from inconvenience applies in the one case as well as the other. But the inconvenience is not so great as has been supposed. You can address a letter to Europe and get an answer in six weeks or less time. In the case of the Commercial Bank vs. Anderson's administrator, October term, 1824, it was decided that the probate of one of three executors of a party plaintiff was insufficient.

4th. Can plaintiff recover on the count on an account stated, where he could not recover upon the items by reason of the illegality of the contract? The statement of the proposition will refute it: that parties can by acknowledging a debt upon a contract prohibited, repeal the law prohibiting it. We concede that an acknowledgement of a balance found due on an account stated, is evidence upon which the plaintiff can recover on the account stated, yet you may inquire into the consideration of the promise. The acknowledgment is evidence of the promise, but the promise must have a consideration, and this is open to inquiry. Fraud and illegality destroys the consideration of the promise. These principles are elementary. But it is said that though the contract be prohibited by law under a penalty, the parties may still recover on it; that is, the contract is good, though the law prohibits it. (*Chitty Cont.* 536.) Our act of assembly prohibits the dealing in lottery tickets without license; (*8th vol.*, 243,) and prescribes a penalty. The law of New Jersey prohibits entirely the sale. Wherever a contract is valid by the law of the place where made, it is valid everywhere else, and the reverse is true. (*Story's Conf.* 200, § 242.) To this general principle there are a few exceptions. The courts will not enforce the revenue laws of foreign countries, &c. &c. So of bills of exchange or promissory notes made abroad and payable here, in some cases the law here is the rule. These are cases of special contract. But that is not this case. The sale was made in New Jersey; the tickets bought there; payments to be made there, if nothing is said about the place of payment. If goods be ordered of a merchant in Philadelphia, the purchase and sale is there. No recovery can be had on a contract upon an illegal transaction. No action will lie on a contract in violation of a public statute. (*17 Mass. Rep.* 258; *4 Serg. & Rawle* 159; *14 Johns. Rep.* 146; *14 Mass. Rep.* 322; *15 Ibid* 35.)

But they say the New Jersey law should have been pleaded. Where a foreign law is the foundation, or forms any part of the plaintiff's claim or cause of action, it must be pleaded; but there is no case in which a defendant in an action of assumpsit, has been

called on to plead a foreign statute. The rule is that whatever shows that the plaintiff ought not to recover, may be given in evidence under the plea of non-assumpsit. (*2 Stark. Pl. & Ev.* 100-1, n. 1; *1 Harr. Rep.* 349, *Maberry & Co. vs. Shissler*.)

Rogers replied.

JUDGMENT.—In the case of *Gregory & Co. vs. Glazier, adm'r. of Bailey* :—And now, to wit, this twelfth day of June, in the year of our Lord one thousand eight hundred and forty-five, the questions of law arising upon the record in this cause having been heard before the Court of Errors and Appeals of the State of Delaware, composed of all the judges of the said State, and fully debated on both sides, by counsel learned in the law, and fully understood by the said court, it is considered by the court;

First. That lottery tickets are a proper subject of charge in a book account.

Second. That the plaintiffs' using the name and firm of James G. Gregory and Company, being the vendees or contractors, under the commissioners, trustees or managers, of certain lotteries authorized by the legislature of the State of Delaware, have the right to sell lottery tickets by wholesale within this State without taking out any license.

Third. That the intestate, Edward T. Bailey, having admitted that the amount claimed by the plaintiffs upon the account stated and settled between them was *due*, the plaintiffs are entitled to recover in an action of assumpsit, against the defendant as administrator of the said Edward T. Bailey, deceased, upon a count in the declaration on "*an account stated*," without going into proof of the items of said accounts.

Fourth. That the want of a license to sell lottery tickets does not impair or affect the validity of the contract of sale.

Fifth. That the acting or managing partner or partners of a firm must join in making probate against a deceased debtor. A member of a copartnership who has not taken upon himself any part of the business of the concern, or who has retired before the debt or demand became due, or the cause of action accrued, or who is a dormant partner, need not join in the probate; nor will it be required of a partner where by reason of permanent absence from the country, or from any other cause, it is impossible to procure his affidavit. And where the same firm carries on business at houses in different States, or in Europe, the probate need be made only by the acting or managing partner or partners conducting the business of the firm at the house where the contract was made, or the debt became due. The

probate in the present case is made only by one partner ; and it does not appear from the record, that the members of the firm who have not joined in the probate are other than acting and managing partners, with the member of the firm who has made the probate.

It is therefore considered by the court, this sixteenth day of June in the year aforesaid, that by reason of the insufficiency of the probate in this cause, the verdict rendered in the Superior Court be set aside and a nonsuit entered : and that the plaintiffs pay the costs in this court, and also in the Superior Court. And it is ordered, that the decision of this court upon the aforesaid questions of law be certified to the said Superior Court in and for New Castle county.

In the case of Rogers vs. Glazier, adm'r. of Bailey :—And now to wit, &c., it is considered by the court,

First. That lottery tickets are a proper subject of charge in a book account.

Second. That the law of New Jersey, passed the 13th of February, A. D. 1797, respecting the drawing of lotteries, &c., sale of lottery tickets, &c., does not prevent the plaintiff from recovering in this action, because its operation is confined to the sale of lottery tickets, and lotteries to be drawn in that State, without the authority of the legislature, or without the authority of an act of Congress of the United States ; and the evidence in this case is that the tickets sold were in lotteries thus authorized.

Third. That the contract between the plaintiff and the defendant's intestate in regard to the sale and purchase of lottery tickets, is a legal contract under the laws of the State of Delaware.

Fourth. That the intestate having admitted that the amount claimed by the plaintiff upon the account stated and settled between them was *due*, the plaintiff is entitled to recover upon the count on "*an account stated*," without going into proof of the items of said accounts.

It is therefore considered by the court, this sixteenth day of June, in the year first aforesaid, that judgment be entered for the plaintiff upon the verdict rendered in the said Superior Court ; and that the defendant pay the costs in this court, and also in the said Superior Court. And it is further ordered, that the decision of this court upon the aforesaid questions of law, be certified to the said Superior Court in and for New Castle county.

Whitely and Rogers, for plaintiffs.

Gilpin and Wales, for defendants.

HENRY MAY, d. b. plff. in error, *vs.* CURRY & DAVIS, plffs. b. defts. in error.

A writ of error will not lie to the decision of a court granting or refusing a nonsuit.

WRIT of error to the Superior Court. Heard before the Chancellor, and Judges Booth and Hazzard.

The case is fully set out ante p. 173, &c., and was argued in error on the same points by *Layton* and *Clayton*, for the defendant below, and by *Houston*, for the plaintiffs; but the court affirmed the judgment on another ground, to wit: that a writ of error will not lie to the judgment of a court granting or refusing a nonsuit.



WILLIAM O. REDDEN *vs.* P. SPRUANCE and others.

The contents of a letter written to the plaintiff by a witness, and detailing a conversation with one of the defendants is not admissible in evidence, the witness being unable to swear to any of the facts from memory, though he is willing to swear to the truth of the letter from confidence in his own veracity.

QUESTIONS reserved by the Superior Court. (See *ante* p. 217.) Heard at the June term, 1845, before the Chancellor, and Judges Booth, Harrington, Milligan and Hazzard.

The action below was against the defendants, proprietors of a line of stage coaches, for carrying the plaintiff's slave out of the State, knowing him to be a slave. Isaac H. Register was called as a witness for plaintiff to prove the admission of Elihu Jefferson, one of the defendants, and the agent of the stage line, that the negro passed through New Castle in the defendants' stage, and that a passenger told him it was plaintiff's slave. The witness at first had no recollection of any conversation with Jefferson on the subject, or of writing any letter to plaintiff; but on being shown the letter, which was dated May 30, 1839, he knew it to be his and recollects writing it, and recollects having a conversation with Jefferson just before writing the letter; but he had no recollection of any thing that was said in his said conversation with Jefferson, nor did the letter now refresh his memory as to any of the facts stated in it. He remembered only that he had a conversation with Jefferson and wrote this letter soon afterwards; and he was willing to swear that the con-

tents of the letter were true, because he would have written nothing therein that was not true.

Layton and Houston, for plaintiff.—The general principle is that a witness can depose only to such facts as are within his own recollection. He may assist his memory by a memorandum, or copy of a memorandum, and his evidence as to facts there stated will be sufficient, if the paper recalls them to his recollection. . (1 *Phil. Ev.* 226.) The rule is subject to many exceptions. The English courts have not merely admitted the witness' notes to refresh memory, but have also permitted a witness to read a statement of conversations collateral to the matter to be proved. The decisions in this country have gone still further; and, taking the common sense ground, that the writing itself is better evidence than the recollections of the witness, have admitted the letter in evidence. (1 *Greenleaf's Ev.* sec. 436, p. 509, sec. 437.) Where the writing is made by another person than the witness, he cannot be permitted to swear to the truth of it; but he may swear to the truth of his own notes. And the paper itself is thus made evidence. (1 *Rawle's Rep.* 152; 12 *Serg. & Rawle* 84, *Smith vs. Lane*; 2 *Nott & McCord* 331; 43 *Law Lib.* 229; 2 *Steph. N. P.* 1780; 8 *Barn. & Cressw.* 14; [15 *C. L. Rep.* 147;] 2 *Adolph. & Ellis* 215, *Ibid* 341; 1 *Stark. Evid.* 176; [29 *C. L. Rep.* 78;] *Ibid* 113.)

Where a witness swears to a *fact*, he may refresh his memory by a writing made at the time; but where he swears to *words*, *he may read it*, if he swears he presently committed it to writing. (Comb. Rep. 445; 1 *East Rep.* 460; 3 *Durnf. & East* 749-52; 8 *East Rep.* 273; *Salk. Rep.* 285; 43 *Law Lib.* 226, *Price vs. Torrington*.)

Where the witness refers to a paper to refresh his memory and the paper is an original, made about the time of the transaction, he may swear from his confidence in the paper itself, though he remembers it not. (43 *Law Lib.* 229; 2 *Hill's Rep.* 445; 15 *Mass. Rep.* 360, [380;] 15 *Wend. Rep.* 193; 16 *Ibid* 586; 1 *Rep. Con. Court* (S. C.) 433, *Haig vs. Newton*; *Ibid* 373, 336, *Sharp vs. Bergley*.)

Frame and Bates, for defendants.—The position may still be maintained, notwithstanding the mass of loose authorities, that a witness is always to speak from his own recollection, refreshed, though it may be by notes. The question here is whether a witness who has forgotten the fact of having written a letter, as well as its contents, can swear to its contents, though not now recollecting one word that it states, upon the letter being presented to and recognized by him, and he now recollecting that he wrote the letter at the time of transactions to which it

refers; and being willing to swear to the truth of its contents merely from his confidence that he would have written nothing untrue: that is, can a witness swear to what he does not recollect, because he finds it in his own handwriting, and is willing to attest his own veracity. This is a new principle of evidence; the old one being that witnesses are to swear from their own memory or recollection refreshed by writings. (1 *Phil. Ev.* 209; 1 *Stark. Ev.* 154-5; 3 *T. Rep.* 749.)

There may be exceptions to this: a memorandum made in the course of business may be one exception. Many of the cases cited fall under this head. So of attesting witnesses to any legal paper. Also where a witness makes a memorandum at the time for the express purpose of perpetuating evidence of the facts. So where identical words are to be proved, as in actions of slander, a record of such words made at the time with a view to evidence may be read in evidence.

This case falls under none of these exceptions. The rule still remains, and is found in all the text books, even such as refer to the cases here cited; that the witness must speak from his own memory of the facts, or from his recollection as refreshed. This is what the court below decided.

Why is the letter produced? Not as evidence in itself and the witness called to prove *it*; but the witness is called to prove the facts, and it is produced to refresh the memory. Failing to do that, if the letter is to be read in evidence, it is in effect allowing the principle of hearsay evidence. For what is it more? Isaac Register writes down a statement of facts, which he will not, because he cannot, swear to as facts; but he swears that he wrote them, and is willing to swear he is an honest and credible man. His written statement is no more evidence than his verbal statement; and if his veracity and honesty are to be proved, it were better to allow some one else to prove it. It is, therefore, a most exceptionable form of hearsay evidence. It violates two of the most important rules of evidence, that which excludes statements not under oath; and the rule that the witness shall be subject to cross examination.

The unanimous opinion of the court was announced by Judge Harrington.

HARRINGTON, Justice.—The general rule of evidence is not questioned, that the witness must swear to facts within his own knowledge, though his memory may be refreshed, and his knowledge verified, by reference to written memorandums. Further than this the memorandum or writing cannot be used; except in cases where it

was made in the usual course of business as evidence of the fact to be proved; as in book entries, notes of presentment, protest, &c.; or where it is made with the knowledge and concurrence of the party to be charged, for the purpose of charging him; or where the verification of the writing itself establishes the fact to be proved, as in the case of the attestation of solemn instruments. So where the question was whether a bill of exchange had passed through a banker's hands, his clerk was allowed to prove his own writing on it, though he did not recollect it. Also with regard to inventories and schedules; precise dates; particular words, and other matters which the memory would not be likely to retain, a greater liberty of reference has been allowed, where the notes were made at or about the time of the transaction, and where the witness remembers that at the time they were made he knew them to be correct and true. This seems to be carrying the principle of substituting memorandums for the sworn recollection of witnesses far enough. It has been done from the apparent necessity of cases occurring so often as to form classes; but none of the cases heretofore adjudged to be exceptions to the general rule of evidence, have come up to the proposition now before us, that a statement of facts in a letter written by a witness, shall be evidence of those facts, merely because he will attest his own general veracity, though he cannot recollect any thing about them. What is that more than the unsworn statement of the witness? He is called to prove a conversation which he had many years ago with one of the defendants, and to establish a fact admitted by the defendant in that conversation. He has no recollection that such fact was admitted by the defendant; he does not remember that at any time he did know that it had been admitted; he did not remember the conversation; or that he ever wrote the letter; but on its production he recognizes it to be his, remembers writing it, and remembers the conversation, and there his knowledge stops; though, being a man of truth, he is willing to swear from general confidence in his own veracity, that what the letter contains is true.

If we analyze this letter it is apparent that it cannot be regarded as legal evidence alone, or supported by proof of the general good character of the writer. It was made for no purpose of perpetuating testimony; from no necessity in the usual course of business; by no one connected with the defendants; by a third person in casual correspondence with the plaintiff; not under oath; not subject to cross examination; and which cannot now be the subject of a cross examination, for the memory of the writer is a blank as to

every matter contained in the letter. It is, therefore, in itself a simple unsworn statement of facts not otherwise proved. Is this strengthened by proof that the writer is in general a man of truth? Certainly not. He is unable to testify on oath as to any fact contained in the letter; and, however good his general character may be, whether proved to be such by himself or by others, it is not good enough, nor is any man's good enough, to dispense with the necessity of an oath, or make an unsworn statement evidence. The question is not whether the witness is a man whose unsworn statements verbally or in writing are likely to be true; it is whether facts so stated can be admitted in evidence without an oath to verify them, and that oath founded upon a knowledge or recollection of the facts, and not merely upon the writer's general reliance on the accuracy as well as truth of his own statements.

The case presents a remarkable instance of failure of memory; and, though we may regret the consequence in this particular case, we are bound by what we consider well settled and wise rules of evidence to exclude the contents of this letter. It states an important admission made to the witness by one of the defendants, and the writer is a man of good character; but his memory does not enable him here as a witness under oath to confirm that admission, and it would be an extremely dangerous precedent to admit his mere statement in evidence.

A great many cases were cited in the argument which it is unnecessary particularly to review. These with many others are examined in the American note to *Price vs. Lord Torrington*, *Smith's Leading Cases*, 43 *Law Lib.* 223, and the result of all of them is "that entries made in the regular and usual course of business are admissible in evidence, after the death of the person who made them, on proof of his handwriting; and, during his life, if authenticated by himself: other entries may be used to refresh the memory, but are not admissible in evidence."

Layton and *Houston*, for plaintiff.

Frame and *Bates*, for defendants.

JOSEPH PERKINS, defendant below, appellant *vs.* THOMAS CARTMELL, Adm'r. of MARGARET CARTMELL, complainant below, respondent.

When a court of equity acts in analogy to the acts of limitation, it adopts the exceptions also.

A legacy is not within the statute.

The principle of acts of limitation is repose and public policy; *sit finis litium*.

They do not in terms extend to courts of equity, but these courts approve of the principle, and apply it to analogous cases.

Where the act bars the legal remedy, the remedy in equity is held barred by analogy. Independently of acts of limitation a court of equity will refuse to aid a stale demand, on the ground of laches and public policy; as well as on a presumption of payment.

There is no bar in case of a trust; but where the trustee disclaims and stands in a hostile relation to the *cestui que* trust, for a great length of time, even a trust will be defeated. Equity will presume an extinguishment of the trust in the case of real estate, after twenty years' adverse holding.

APPEAL from the decree of the Chancellor, in and for New Castle-county.

Tried at June term, 1845, before Judges Booth, Harrington, Milligan, and Hazzard.

The bill stated that Caleb Perkins, died 28th of June, 1804, seized of real and personal property, and by his will dated 24th May, 1804, bequeathed to his daughter Margaret, wife of Thomas Cartmell, one hundred pounds, subject to the deduction of testator's book account against her, to be paid in three years after testator's death, by his son, Joseph Perkins, out of certain real estate devised to him, and made his said son and one Isaac Stevenson, executors; who proved the will and took possession of the personal property, and said Joseph, of the real estate devised to him as aforesaid, charged as aforesaid. His daughter Margaret continued under coverture until the 9th of January, 1838, when her husband, Thomas Cartmell, died. She survived him until the 24th of Dec., 1841, and died, leaving five children, of whom complainant, her administrator, is one. He administered on the 16th of September, 1842. The said legacy was never paid to Thomas Cartmell in his life time, nor to his widow, nor any part of it, though frequently demanded. It survived to the said Margaret on the death of her husband, and complainant as her administrator, is entitled to it; with interest from the 28th of June, 1807.

The bill prayed an account, and for payment of the legacy, and for further relief, &c.

The answer admitted the material statements of the bill, but denied that any demand had been made for said legacy for more than *thirty* years; that the legacy was in fact satisfied by a book account left by testator, to the amount of £50 5s.; and a note of hand due him from said Thomas Cartmell, the husband, of £45; which was not collected by this defendant, being considered both by Thomas Cartmell and himself, as applicable to the legacy, and to be deducted therefrom; and the said Thomas Cartmell, bought at the vendue, articles more than sufficient to pay the balance of said legacy; so that for more than thirty years said legacy had been regarded by all parties as *paid*: and relied on the lapse of time as a *bar* to the demand.

The only important facts proved by the depositions were, that complainant called on defendant before filing the bill, to examine the testator's books and come to a settlement; that there was a charge on said books of £11 5s., against Margaret Cartmell, and the defendant showed a note of Thomas Cartmell, deceased, to the testator, for £45 5s., and a vendue list containing articles purchased at the vendue, by Thomas Cartmell, amounting to \$36, which defendant said were the only charges he had against Thomas Cartmell, deceased, or his wife; and that defendant declined a reference.

On the hearing of the cause before the chancellor, an interlocutory decree was made according to the prayer of the bill; for which he now assigned the following reasons:

JOHNS, JR., *Chancellor*.—I suspended my judgment on the plea of actual payment, but the book shown me was so altered that I suspected it. I thought also from the devisee and executor, who was still alive, presenting Thomas Cartmell's note, still in his possession, that there had never been a settlement or he would have delivered it up. I thought these were rebutting circumstances to the presumption of payment. In addition to this I considered the settled rule of equity, in a matter of presumption, to be, that they followed the acts of limitation both as to the bar and the exceptions. In analogy to the statutes of limitation I thought the widow's claim protected by her coverture. (a)

(a) The chancellor subsequently handed to the reporter the reasons for his interlocutory decree, more at length. On the subject of limitations in equity, he remarked:—"I admit in all cases to which the statute of limitation can be applied, it is a good plea in equity as well as at law. The statute operates as a bar to the remedy at law, and is applied by analogy in equity,

The appeal was from this decree, and was argued by *Rogers, jr.*, for appellant; and *Gilpin*, for appellee; on 1st. The evidence of and therefore, cannot be applied to those trusts which are the mere creatures of equity, for there is no ground in such cases for comparison; but when the same subject matter of demand in equity can also be made the subject or cause of action at law, the rule of analogy applies in all its force. In *Bond vs. Hopkins*, 1 *Sch. & Lef.* 413, Lord Hardwicke observes, ‘the statute of limitations does not apply in terms to proceedings in courts of equity, but equitable titles are affected by analogy to it.’ In *Hovenden vs. Lord Annesley*, 2 *Sch. & Lef.* 607, Lord Redesdale went more at large into the doctrine of limitation of suits in equity. The principle of the last case is, that where the party has a legal as well as an equitable remedy for the same cause, if the equitable title be not acted on in the same time the legal title should be, it is barred. In the case of *Kane vs. Bloodgood*, Chancellor Kent takes it for granted as the assumed and settled doctrine, that an action at law will not lie in the case of a mere charge upon land where there is no personal undertaking. (7 *Johns. Ch. Rep.* p. 113.) Chief Justice Spencer, in a case reported, 20 *Johns.* 576, 610, after adverting with approbation to the opinion of Lord Hardwicke, in *Sturt vs. Mellish*, 2 *Atk.* 610, and showing that the plaintiff had ample remedy at law, observed, ‘I have therefore, no hesitation in saying that in a case where there is a concurrent jurisdiction in the courts of common law and equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in one court as in the other. In cases of fraud, peculiarly, appropriately and exclusively the objects of equity jurisdiction, according to the established doctrine, the statute cannot be pleaded.’

If in the present case, the legacy had been payable by the executor out of the personal effects, then the jurisdiction of the courts of common law and equity, upon such a cause of action being concurrent, the analogy would exist and the statute would apply, extending to the wife surviving, the three years according to the exception. For by the act in *Dig. Del. Laws*, p. 228, an action of assumpsit may be maintained against an executor or administrator, for a legacy or a distributive share. Assets in the hands of an executor or administrator to pay a legacy, shall create a legal liability and raise a consequent promise to pay it. ‘*This action shall not lie for a legacy which is either directly or by implication the subject of a Trust.*’

The claim made in this suit, being for a sum charged by will on real estate devised and to be paid therefrom by the devisee, is a trust, only capable of being enforced in a court of equity, which has the exclusive jurisdiction, and therefore must be, according to the rule established by all the cases, excluded from the operation of the statute of limitations.”

payment. 2d. The presumption of payment. 3d. The application of the act of limitation.

Mr. Rogers, cited, 2 *Ves. jr.* 11; 3 *Bro. Ch. Ca.* 639, n.; 4 *Bro. Ch. Rep.* 214-57; 4 *Eng. Chy. Rep.* 521; 8 *Bligh.* 622; 2 *Iredell's Eq. Rep.* 282; 13 *Pick. Rep.* 393; 9 *Pet. Rep.* 405; 17 *Ibid.* 197.

Mr. Gilpin, cited, 2 *Story's Eq.* 505, sec. 1520; 3 *Bro. Ch. Rep.* 527, n. 7; 1 *Sch. & Lef.* 414-39; 2 *Ibid.* 607-29-42; 3 *P. Wms.* 287, n. 6; 6 *Cond. Rep.* 58, (10 *Wheat.* 152); 1 *Law Lib.* 35, (*Blansh. on Lim.*)

The Court reversed the decree of the chancellor and dismissed the complainant's bill.

The Chief Justice delivered the opinion of the court.

Booth, Chief Justice.—It is attempted to support the decree in this case on two grounds: 1st. That as a court of equity acts in analogy to the statutes of limitation, it adopts the exceptions contained in those statutes in favor of the disabilities of infancy, coverture, &c. That as Margaret Cartmell was under the disability of coverture when the will was made, and so continued until the death of her husband in 1838; the right to institute a suit for this legacy was saved to her, during that period; and afterwards to her and her administrator, until the expiration of ten years from the removal of her disability; by analogy, it is said, to the saving in the act for the limitation of actions and entries concerning lands. (*Dig. 396.*) Therefore, that this suit, notwithstanding the lapse of time, is protected by the coverture of Margaret Cartmell.

2d. Supposing this to be a case where a court of equity acts independently of any statute of limitation, and presumes payment or satisfaction from length of time; it is further argued, that the presumption is repelled, 1st. By the coverture of Margaret Cartmell: 2dly. By the fact, that the defendant undertakes to show the manner in which this legacy was settled and paid; and upon the production of the testator's book account, the note of Thomas Cartmell, deceased, and the vendue list, it does not appear that any settlement was made: and although the book showed considerable transactions between Thomas Cartmell and the testator, and but one item against Margaret Cartmell, it was not entitled to credit, because some alteration appeared to have been made in it.

Upon neither of these grounds can this decree be sustained. 1st. In those cases where courts of equity act in analogy or conformity to the statutes of limitation, they adopt the exceptions in favor of the usual disabilities. If the statute is not adopted, the exception is

not. As a legacy is not within the statute of limitation, it cannot be said, that courts of equity in suits for legacies, adopt the statute or its exceptions, or act in analogy or conformity to the statute. Therefore, the coverture of Margaret Cartmell is no protection to this suit by virtue of the saving clause in the act (*Dig.* 396,) for the limitation of actions and entries concerning lands; because the act itself does not extend to the case of a legacy.

This is apparent from a consideration of the reasons which have induced courts of equity to adopt the several statutes of limitation. It was a rule of the common law, that a right never dies; and therefore the power existed of instituting actions at any length of time, however distant from the period when the right first accrued. To quiet possessions, to secure repose from litigation, and to prevent perjury, fraud, and injustice, it was found necessary to restrain the exercise of this power. For this purpose, the several statutes of limitation were passed, prescribing certain periods within which actions were required to be instituted; and in case of neglect, that the lapse of time might be insisted upon, as a complete bar. These statutes in their terms are confined to actions at law, and do not extend to suits in equity. But courts of equity consider themselves within their spirit and meaning; and that sound policy and public convenience require their adoption. Hence it is an established rule, that where the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity. (*Meldicot vs. O'Donel*, 1 *Ball & Beatty* 156; *Thomas vs. Harvie's heirs*, 10 *Wheaton* 149, 150; *Elmendorf vs. Taylor*, 10 *Wheaton* 168, 170.) In *Smith vs. Clay*, 3 *Bro. C. C.* 639, note, Lord Camden says: "As often as Parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule and applied it to similar cases in equity." "And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

Thus, as the statute, 4 Hen. 7, chap. 24, called the Statute of Fines, bars the right of action or entry, unless pursued within five years next after proclamations made, or after the right accrues, an equity of redemption, is barred by a fine levied within five years from the day on which the last proclamation was made. (*Salisbury vs. Baggot*, 2 *Swansl.* 603.)

So too, as the statute, 21 *James 1, chap. 16*, bars the right of entry into lands after an adverse possession of twenty years, a court of equity will not permit the mortgagor to redeem, after he has suffered the mortgagee to remain in the undisturbed possession of the mortgaged premises for twenty years: And the reason given, is, "that the court is bound to regulate its proceedings by analogy or in obedience to the statutes of limitation." (Blanchard on *Limitation*, 64, 65, and cases there cited.)

For the same reason, the mortgagee is barred, after he has permitted the mortgagor to remain in possession of the mortgaged premises for twenty years, without account, and without any payment of interest, or promise to pay, or acknowledgment that the mortgage is still existing. (*Hughes vs. Edwards*, 9 *Wheaton* 467.)

The period of limitation adopted in conformity to the statute 21 *James 1*, is not confined to the case of a mortgagor and mortgagee; but extends to all equitable estates, or equitable titles or claims to land, where an adverse possession of twenty years has been acquiesced in; and where, had it been the case of a legal estate, the party claiming must have sued in a court of law within that period. (*Elmendorf vs. Taylor*, 10 *Wheat.* 170-4, and authorities there cited. *Miller vs. McIntyre*, 6 *Peters* 66; *Piatt vs. Vattier*, 9 *Peters* 416.)

A bill of review is barred in England after twenty years, by analogy to the statute 10 and 11 *Wm. 3*, which barred writs of error after that period. (*Smith vs. Clay*, 3 *Bro. C. C.* 639, note.)

But in the courts of the United States, a bill of review is barred after five years from the time of pronouncing the decree, by analogy to the act of Congress which limits appeals in equity to that period. (*Thomas vs. Harvies' heirs*, 10 *Wheat.* 146.)

Where a personal action is barred at law by the statute of limitation, a bill for relief is barred in equity; and therefore accounts for rents and profits are limited to six years, by analogy to the time of limitation at law. (*Parker vs. Ash*, 1 *Vern.* 256; *Reade vs. Reade*, 5 *Ves.* 749; *Stackhouse vs. Barnston*, 10 *Ves.* 469.)

Courts of equity thus acting in obedience to the statutes of limitation in cases analogous to those on which the statutes operate at law, have adopted in such cases, the exceptions in favor of the usual disabilities; and allow to those laboring under them, the same time to sue in equity, as they would be entitled to, at law, in case of a legal claim. (*Lytton vs. Lytton*, 4 *Bro. C. C.* 458; *Belch vs. Harvey*, 3 *P. Wms.* 287, note.)

The result clearly follows, that if no statute of limitation bars the

case at law, the same, or the analogous case in equity is not barred. (*Slackhouse vs. Barnston*, 10 *Ves.* 466.) And that where the statute is not adopted, the saving clause which it contains, in favor of a disability, is not adopted.

A legacy was not barred by any statute of limitation, prior to the 3 and 4 of Wm. 4. That such was the received doctrine of courts of equity, is manifest by the many cases, where the only question was, whether after a great length of time, payment should be presumed. (*Higgins vs. Crawfurd*, 2 *Ves., jr.* 571; *Parker vs. Ash*, 1 *Vern.* 256.)

Therefore, the principle adopted and relied upon, to support the present case, namely : that ten years are allowed after the cōverture of Margaret Cartmell ceased, for filing a bill for this legacy, by analogy, as is said, to the proviso in the act of 1793, for the limitation of actions and entries concerning lands, *Dig.* 396, is a principle arbitrarily assumed, and unsupported by precedent or authority.

With quite as much reason might the proviso of any other act of limitation be adopted. As the action of assumpsit is a remedy given by our act of assembly (*Dig.* 228,) against an executor for a legacy; and as the act (*Dig.* 397, 398,) which bars assumpsit after the expiration of three years from the accruing of the cause of action, contains a proviso saving to persons under disability, the right to sue within three years from its removal; it would seem to have more the appearance of reason, to adopt the proviso of the latter, than of the former act.

2. This suit is barred by lapse of time independently of the statutes of limitation, upon the presumption of payment and satisfaction, which presumption is not rebutted.

The defence founded upon mere lapse of time and the staleness of the claim, in cases where no statute of limitation directly governs the case, is said by Judge Story, (*2 Comm. on Equity Jurisprudence*, § 1520, p. 904,) to be a defence peculiar to courts of equity.

Upon general principles of their own, independently of the statutes of limitation, they have always discountenanced laches and neglect ; and refused their aid to stale demands where the party has slept upon his right, or acquiesced for a great length of time. They are never active in relief against conscience or public convenience. After a considerable lapse of time, they refuse to interfere, from considerations of public policy and the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost. This is their established doctrine. (*2 Story's Equity Jurisprudence*, § 1520, and notes; *Smith vs. Clay*, 3 *Bro.*

C. C. 640, note; *Piat vs. Vattier*, 9 Peters' Rep. 416, and cases cited; *McKnight vs. Taylor*, 1 Howard's Rep. Sup. Court, U. S. 168.)

In all cases in equity, where the statutes of limitation do not operate, suits are barred by lapse of time: 1st. Upon the ground of public policy, the peace of society, the inconvenience of the relief, or that it is against conscience or good faith: 2d. Where the presumption arises of something having been done, which is adverse and destructive to the plaintiff's demand. Every reasonable presumption is made from lapse of time which the circumstances of the case will fairly admit. For example; in the case of an express or direct trust, as between the cestui que trust and trustee, there is no bar by the statute of limitation; and so long as the trust is admitted by the acts or declarations of the parties, there is no bar by lapse of time. But if the trustee disclaims, disavows, or denies the right of the cestui que trust, and the latter acquiesces for a great length of time, as for instance, in the case of real estate for a period of twenty years, a court of equity will presume an extinguishment of the trust. (*Kane vs. Bloodgood*, 7 Johns. Chy. Rep. 123, 124; *Willison vs. Watkins*, 3 Peters' Rep. 48, 52; *Boone vs. Chiles*, 10 Peters' Rep. 223.)

But the defence founded on presumptions from lapse of time, is not peculiar to courts of equity. At common law, although as has been said, it was a rule that a right never dies; presumptions were always raised from lapse of time, independently of the statutes of limitation. These presumptions like the doctrine of courts of equity are the result of human experience; and are founded on the same principles of public policy, to quiet possessions and prevent litigation, which dictated the several statutes of limitation. The uninterrupted, exclusive and adverse enjoyment of an incorporeal hereditament for twenty years, has been held at common law, as a conclusive presumption of title. (*Bealy vs. Shaw*, 6 East 215.) Conveyances between individuals and grants from the crown or a sovereign state, notwithstanding the legal maxim "nullum tempus occurrit regi" have been presumed after the lapse of many years of uninterrupted and adverse possession. The lapse of twenty years raises the presumption, that bonds, judgments, decrees, recognizances and other matters of record have been satisfied; and unless repelled by circumstances explaining the delay, or by evidence of an acknowledgment of the debt within that period, the presumption is conclusive, and is a complete bar under the plea of payment. A legacy charged upon land is within the same principle. No sufficient reason can be

given for making any distinction in this respect between it, and the case of a judgment or recognizance binding on lands.

In the present case, the legacy was bequeathed to Margaret Cartmell when a feme covert, and became due during her coverture. George Cartmell, her husband, during his life time, had absolute control over the legacy; was the only person who had a right to demand it; to whom payment could be made; or by whom an acquittance or discharge could be given. He lived upwards of thirty years after it became due. Under these circumstances the law raises the presumption from the mere lapse of time, that payment or satisfaction was made to him. No fact is proved which repels this presumption. The parties all lived in the same neighbourhood. Margaret Cartmell lived upwards of thirty-three years after the legacy became due. It does not appear that any demand of payment was ever made by her or her husband. After the lapse of thirty-five years, it is said the complainant, as the administrator of Margaret Cartmell, made a demand of the defendant; but even this fact is denied by the answer. For thirty-five years then, the claim has been permitted to slumber. Nothing is shown to account for, or in any manner to explain this laches and neglect. No obstacles have been interposed by the defendant in the way of a settlement; nor is there the slightest evidence of an acknowledgment, part payment, or promise to pay, on his part, at any time; but on the contrary, a positive denial that any thing was due. The presumption of payment from the mere lapse of time, being in nowise repelled, is conclusive. Had Thomas Cartmell, after twenty years from the time the legacy became due, instituted a suit against the devisee of the land, the lapse of time without any proof of a recognition of the claim, would have been conclusive, and equivalent to evidence of an actual payment. It is admitted in the argument, that had he sued either alone, or joined his wife, the suit after the lapse of twenty or twenty-five years, would have been barred. On what principle then, can it be maintained, that the coverture of Margaret Cartmell rebuts this presumption of payment? How can the fact of her surviving her husband, extinguish all the evidence in the case, and confer on her, or her administrator, a right to recover a legacy, which in contemplation of law, has been paid and satisfied to the only person who for thirty years had a right to demand it, and to whom payment or satisfaction could legally be made?

Equally untenable is the position, that the presumption is rebutted,

because, on the production of the testator's book account and the other exhibits, a settlement is not shown; or because an alteration seems to have been made in the testator's book, but whether by the testator, or by whom, does not appear. The defendant avers in his answer, that the legacy was paid and satisfied in a settlement of the transactions between him and Thomas Cartmell respecting the testator's personal estate; and he names the items that entered into the settlement; and they manifestly overpay the legacy. By the account produced as an exhibit, which was settled by the defendant as executor, before the register of New Castle county, on the 29th of December, 1807, six months after the legacy became due, it appears that the defendant was charged as executor, with two of those items, namely, the note of £45, given to the testator by Thomas Cartmell, and the amount of the articles purchased by him at the vendue, neither of which the defendant avers in his answer, was ever paid to, or collected by him, in consequence of the understanding between him and Thomas Cartmell, that they were to be deducted from the legacy. The note is still in the defendant's possession. By the testator's will, two-thirds of his personal estate were given to the defendant to assist him in discharging the legacies which he was directed to pay. It is not reasonable to suppose that the defendant would have made himself personally liable in his settlement before the register, for the amount of the note and the articles purchased at the vendue, unless Cartmell had paid such amount, or agreed that it should be set off against the legacy. On the other hand, the supposition is equally improbable, that Cartmell would have made such payment without requiring payment or satisfaction of the legacy. The conduct of the parties can be reconciled only upon the ground that all these matters were settled between them, and that Cartmell thus appropriated and applied the legacy of his wife to his own use and benefit. He had the legal right to do so; and it is a very reasonable and natural inference that he exercised a right to which his interest strongly impelled him. The consideration of these transactions confirms the presumption of payment, instead of impairing it. But, suppose some obscurity may rest over the case, which cannot at this length of time be satisfactorily removed. Is it not unreasonable after the lapse of thirty-five years, to require a clear explanation of difficulties which may exist in matters of account, and to conclude that no settlement was ever made, because none can be shown by a book of accounts, or by a calculation in figures? It is for the very reason, that doubts and difficulties do occur in such cases, and

because there are no means of creating belief or disbelief, that the presumption of law is raised and adhered to. (*Prevost vs. Gratz*, 6 *Wheaton* 504; *Hillary vs. Waller*, 12 *Ves.* 266.) And though it has often happened to be against the truth of the fact, yet it is better for the ends of general justice, that the presumption should be made and favored, and not be easily rebutted. (Per Lord Commissioner Eyre, in *Jones vs. Tuberville*, 2 *Ves. jr.* 13.)

In the present case, after the lapse of thirty-five years, when the dealings and transactions between the original parties must necessarily be involved in some uncertainty; when those who had the best opportunities of being acquainted with those dealings and transactions may be dead, or those who undertake to testify can speak only from a faded and doubtful recollection, the effort is now made to compel the payment of this claim, with nothing to sustain it, but the single, insulated fact, that the testator bequeathed the legacy, and charged it on the land of his devisee. The case then, is one where the defence founded upon lapse of time, said to be a defence peculiar to courts of equity, must prevail, by raising the presumption of payment and satisfaction; which so far from being repelled by any thing shown in evidence, is confirmed by corroborating circumstances, and therefore becomes conclusive.

The judgment of the *Court* is, that the decree be reversed and the bill dismissed.



JAMES C. PRITCHETT, surviving partner, &c. *vs.* JEHU CLARK.

The judgments of courts of other States are conclusive in all the States. If the jurisdiction of the court appear by the record, it is conclusive, and the defendant cannot plead against the record that he was not served with process, or did not appear.

The judgment of the Superior Court on this question in 3 *Harr. Rep.* 517 reversed.

WRIT of error to the Superior Court in and for New Castle county. Tried before the Chancellor, and Judges Milligan and Hazzard, at the June term, 1845.

This case was again argued by *Wales*, for plaintiffs in error, and *Bates*, and *Bates*, jr., for defendant in error. The principles, and

authorities cited, with a particular statement of the case may be found in *3 Harr. Rep.* 517; the argument here being the same, and supported by the same authorities.

The question was, whether in an action on a judgment recovered in another State, and where the judgment record showed on its face the service of process and appearance of the defendant, he could be allowed, by a special plea, to controvert the record by denying notice or appearance.

A majority of the court, reversing the decision of the court below on this question, held the record to be conclusive; and that no such plea could be pleaded against it.

The Chancellor delivered the judgment of the court orally; taking the same ground, and supporting it by the same general reasoning, as was presented by him (dissenting) when the case was before this court at the June term 1840. (*3 Harr. Rep.* 248.)

Judge Milligan added some remarks in explanation of the decision at that term; which was upon a question of pleading, and did not necessarily involve the effect of the judgment record; as to which he said "he had never entertained a doubt." He considered such judgments, duly authenticated, not only *prima facie* evidence of debt, but conclusive, whenever it appears from the record that the court rendering the judgment had jurisdiction of the parties, and of the subject matter.

The chief doubt he had felt in relation to the present case had been, whether the record showed a sufficient notice to, and appearance of Jehu Clark, one of the defendants to this suit. But when he considered that the original proceedings were against the defendants, *as partners*; that it had been decided that the appearance of one partner may bind another: that the return of the sheriff, in this case, (which was C. C. & B. B.) may be fairly interpreted as applying to *both*: that a recognized officer of court appeared and marked his name for *both*; and, above all, that a commission for taking the testimony of witnesses was taken out for *both*, and sent to this county, where Jehu Clark resides; and that the said commission was executed and returned,—he was bound to conclude that there was notice to *both*, and that they did *both* appear.

He therefore, concurred with the chancellor in reversing the decision of the court below."

Judge Hazzard dissented. The record, (he said) did not show, satisfactorily to him, the appearance of Jehu Clark; and this was a matter that ought not to be left in any doubt. And, even if it did

show an appearance, he thought that, on general principles, a party ought to be allowed to controvert a fact so essential to the jurisdiction of the court rendering the judgment, as this. Although the constitutional requisition was operative, and must be obeyed, in reference to the judgments of courts of sister States having jurisdiction, and "full faith and credit shall be given them;" yet "every court must feel a repugnance to holding as conclusive and incontrovertible, a judgment recovered in another State, against one who had no notice of the suit; who made no defence; and had no opportunity of making defence." To adopt the principle of an estoppel by the record in all cases of judgment against a citizen of this State, in another State, would in his opinion, place in jeopardy the rights and interests of the citizens.

Judgment reversed.

Wales, for plaintiff.

Bates and Bates, jr., for defendant.

SUPERIOR COURT.

FALL SESSIONS,

1845.

WILLIAM B. KING'S Adm'r. vs. JOSHUA J. LAMEDEN and DANIEL HEARN.

A general avowry in replevin for rent in arrear may be proved generally, but if it set out a lease it must be proved accordingly.

THIS was an action of replevin by William B. King in his life time, to recover the possession of certain goods distrained by Hearn, as the bailiff of Lambden, for rent.

The defendants avowed the taking for rent in arrear and due, "for a certain farm and premises in Nanticoke hundred, adjoining lands of O. Isaacs, John Spicer, and others, commonly called the Fleetwood farm, for one year from the 1st of January, 1843, at a rent of \$110." The defendants proved an agreement or lease for Lambden's farm, called the Fleetwood land, adjoining Noble Conoway and others.

Mr. Layton, argued that the party was bound to the same strictness in his avowry as would be required in an action founded on the lease, and a declaration thereon; and that there was a plain variance between the avowry and the lease; the one stating the premises as adjoining Isaacs, Spicer, and others; the other describing the premises as adjoining Conoway and others. (*Ros. Civ. Ev.* 355.)

Mr. Houston, said that the act of assembly authorized a general avowry without a particular description of the premises, and that there had been no particular description of the premises made in this avowry. The Conoway farm is described by other names in the avowry because Conoway has since died.

Mr. Layton, agreed that there was no necessity of setting out a particular description of the premises; but whatever description is given must not be inconsistent with the lease referred to in the avowry.

The Court.—The defendant has not avowed for rent due *under this lease*, and has made no reference to it whatever. If he had set it out in his avowry, or stated that the rent was due in pursuance of it, the objections now stated would be fatal as matters of variance; but the party is authorized by our act of assembly to avow generally without setting out the lease or agreement under which the rent is claimed. The defendant has done so here. He has avowed the taking the goods for rent in arrear and due for a certain farm, &c. This he may prove by the production of a written lease or a parol agreement; and if the paper now offered is for a different place than the one referred to in the avowry it proves nothing, but it is not objectionable on any ground of variance from the avowry, because there is no reference to it in the avowry.

Lease admitted; exception prayed and granted.

Verdict for \$41 59.

Layton, for plaintiff.

Houston, for defendant.



JOSEPH I. LYNCH'S Executrix vs. NATHANIEL TUNNELL, p. b.

Judgment cannot be entered by a justice of the peace on a judgment note *after the death of the maker of the note*.

The authority given to enter such judgment is revoked by death; and does not extend to authorize a judgment against the executor.

CERTIORARI to Justice Steel.

The record showed that the judgment in this case was rendered by a justice of the peace against Mary W. Lynch, as administratrix of Joseph I. Lynch, on a judgment note given by the said Joseph I. Lynch in his life time to Nathaniel Tunnell; with authority to any justice of the peace within the State of Delaware to enter judgment before him against the maker.

On this note was endorsed a regular probate by Nathaniel Tunnell, made before the justice on the 27th of November, 1843, that nothing had been paid or delivered towards satisfaction of the same, and that the sum demanded, viz., \$7 42, was justly and truly due. Whereupon justice Steel, on the 3d of August, 1844, and *after the death of Joseph I. Lynch*, entered a judgment against Mary W. Lynch, his administratrix, for the amount of the note.

This was the principal error assigned, that the justice had no power to enter judgment upon the warrant of attorney given by Joseph I. Lynch *after his death*; nor did the entry of judgment *against his executrix* conform to the authority given to enter a judgment against him.

And for this reason the court set aside the judgment and proceedings. These authorities must be strictly followed, and the judgments rendered in pursuance of them must be entirely conformable to them. The death of Joseph I. Lynch was a revocation of the power of attorney to confess judgment; and the remedy, after that, was by action upon the note in the usual form against the executrix.

Judgment reversed.

Layton, for the defendant below.



DAWSON DULANY, negro, by next friend, *vs.* ELIZA GREEN.

- A deed of manumission executed by an insolvent man, without any consideration, and with intent to defraud creditors, is void. *
- A deed executed by a man when so much intoxicated as not to understand what he is about, is void; at least, as to third persons.

PETITION for freedom.

The petition stated that Jesse Green, jr., being the owner of petitioner and his mother, Clansey, as slaves for life, and being about to leave the State, on the 9th of July, 1833, executed his deed of manumission in due form, by which he proceeded to manumit and dispose of said slaves as follows: "Now therefore, know all persons, that for and in consideration of her the said negro's good conduct and behavior towards me, I do hereby discharge her the said Clansey, negro, from me and all persons claiming by, through, or under me after I shall leave this State, to be free, and to enjoy all the privileges of other free negroes, according to the laws of this State in like cases, and that the said Clansey is to have the said Dawson, her son, until such time as I shall call for him, and to be delivered to no other person or persons, neither to be the property of any other person or persons except I myself, in person; and if I should not receive the said boy, for him to be free as his mother aforesaid, according to the laws of this State;" which deed of manumission was signed, sealed and acknowledged by the said Jesse Green, jr., before a jus-

tice of the peace for Sussex county, and was afterwards on the 2d of July, 1834, recorded in the recorder's office at Georgetown. That Jesse Green, jr., in 1833, or 1834, left the State, and after an absence of four or five years, returned again, but did not demand the said Dawson, or claim to exercise any ownership over him; and after spending several months in this State, the said Jesse left the State again, and died out of the State. Petitioner has since been claimed by Eliza Green, the widow of Jesse Green, jr., and she still claims him.

The defence was that the manumission was not valid; that it was made in a drunken fit, and to defraud creditors; that the negroes were sold at sheriff's sale as Jesse Green's property, and bought by defendant. The depositions proved that Jesse Green, jr., bought Clansey and her son the petitioner, in 1831, at public sale, as slaves for life, for \$201; that he became very dissipated and reckless; parted from his wife; got involved in debt, and became insolvent; went off and enlisted in the U. S. service, at Philadelphia, and died. That he was drinking on the day of the execution of the deed of manumission; and had for weeks before been constantly drunk, and then had mania a potu; that before the date of that deed, an execution had been issued against him, and delivered to the sheriff, but not levied; that a levy was afterwards made, but after the date of the deed of manumission; that the woman Clansey and her said son were sold by the sheriff as the property of Jesse Green, jr., and bought by respondent.

The Court dismissed the petition on the following grounds: 1st. Because the deed of manumission was not an absolute, but conditional deed; 2d. Because it was made when Jesse Green, jr., was drunk, if not insane; and incapable of doing any rational act; and 3d. That at the time of making this deed, Green was insolvent, and it was made with the intention of defrauding creditors.

The Court distinguished between this case and one of an insolvent man fairly selling property for value. They said that this was not a sale, but a gift of property; and by the principles of the common law, independently of the act of assembly, a man cannot give away his property for the purpose of defrauding creditors.

Petition dismissed.

Houston, for petitioner.

Cullen, for respondent.

THOMAS WEST vs. PETER D. SHOCKLEY & JOHN W. DERRICKSON.

A constable cannot levy upon property *after* the return day of his writ. If he does so he is a trespasser.

If a levy have been duly made, the property may be taken away after the return of the writ.

The plaintiff is not answerable for irregular execution of his process, unless he commands or ratifies it.

The costs of witnesses summoned to increase costs, or without due caution, will be disallowed in taxing the bill.

THIS was an action of trespass de bonis asportatis. The defendants pleaded not guilty, and a justification under judgment and execution at the suit of P. D. Shockley, assignee of W. R. Parsons, plaintiff, against Thomas West ; and execution process at the suit of Peter R. Shockley, against the said Thomas West. Replications and issues.

Layton, for plaintiff, contended on the proof: 1st. That as the constable, Derrickson, seized plaintiff's property under execution process at suit of Shockley, *after* the return day of the execution ; the execution did not justify them, and they were both trespassers. (*2 Saund. Pl. & Ev.* 691 ; *6 Term Rep.* 316 ; *Dougl.* 359 ; *2 Esp. N. P. R.* 585 ; *4 Johns. Rep.* 450 ; *9 Ibid* 117.) The constable was liable as a trespasser because the expired writ did not justify the seizure ; the defendant Shockley was liable on proof that it was done by his orders, and he ratified it afterwards ; 2d. That the possession of the plaintiff was evidence of his owning the property seized ; 3d. As to damages, that they were to be not merely compensatory, but exemplary, there being evidence of malice.

Cullen and *Saulsbury*, replied : 1st. That if the executions were issued and regularly placed in the hands of the constable Derrickson, and he levied on the plaintiff's property before the execution expired, he had a right to take it afterwards, and was not a trespasser by doing so. The law will presume that a police officer has done his duty, and as it was his duty to make this levy before the return day of the writ, the presumption will be that the levy was here regularly made. By the levy the right of possession was in the constable, and he could take possession at any time. 2d. That a party who sues out and delivers to an officer, valid process, is not answerable for any irregularity in the execution of it, unless he is shown to have ordered such irregular action. Neither would a subsequent ratifica-

tion render him liable, unless he is shown to have known of the irregularity. (9 Johns. Rep. 118.) 3d. That if the plaintiff had not proved the property to have belonged to him, he could not recover. 4th. That plaintiff was not entitled to recover exemplary damages; nor even the price of the property, which was returned to him; and that he could recover only for the injury sustained by being deprived of his property for a short period. They denied that there was any proof of malice.

The Court:

BOOTH, *Chief Justice*, charged.—In an action of trespass for injury to personal property, the plaintiff must prove: 1st. The property, of which possession is sufficient *prima facie* evidence. 2d. The trespass. 3d. The damage. The pleas were not guilty, and justification under execution process. The first plea puts in issue the fact of the trespass, &c.

If property be taken by a public officer having no writ in his hands, or after the return day, he is a trespasser. But if a levy be made before the return day of the writ, and the property remains in the possession of the defendant, the officer may, after the return day, take possession of the property levied on; and for so doing he would not be a trespasser. As to the plaintiff in the execution, he would not be liable as a trespasser, for irregular execution of the process, unless he is shown to have ordered this mode of execution, or unless he participated in the trespass.

As to the damages, they should be allowed only for the injury arising from being deprived of the possession of the property for the time it was out of plaintiff's possession, and any depreciation in its value arising from the seizure and detention.

Verdict for plaintiff, 25cts.

Layton, for plaintiff.

Cullen and Saulsbury, for defendants.

On motion the court disallowed the costs of five of the witnesses summoned by the plaintiff, because their testimony was immaterial.

FARMERS' BANK, *use of J. THOROUGHGOOD *vs.* E. D. CULLEN,*
Adm'r. of C. M. CULLEN, dec'd.

An executor cannot be charged as such for money had and received to plaintiff's use. Such a count cannot be joined with one on an account stated with an executor as such. The judgments are different.

DEMURRER. The declaration contained three counts. The first was special, and set out that whereas, heretofore, to wit: on, &c., at &c., the plaintiff recovered a judgment against C. M. Cullen in his life time for \$1,315, which is still unsatisfied; that by virtue of sundry proceedings on said judgment, and sundry writs of execution particularly set out, the lands of the said C. M. C. had been sold, and a large amount of the proceeds applied to said judgment, to wit: \$835; that defendant had been duly appointed administrator of said C. M. C., deceased; that assets had come to his hands as administrator applicable to said judgment, sufficient to satisfy the balance appearing due thereon, as appeared by the final administration account passed by the said E. D. C., before, &c., on, &c., and having such sum in his hands, so applicable, "he the said E. D. C., administrator as aforesaid, in consideration thereof undertook, and then and there faithfully promised the said plaintiffs to pay them the said last mentioned sum of money when he should be thereunto afterwards requested, &c."

The second count recited that "whereas also, the said E. D. C., *as administrator as aforesaid afterwards*, on, &c., at, &c. was indebted to the said plaintiffs in the further sum of \$1,000, "for so much money by the said E. D. C., administrator as aforesaid, before that time had and received to and for the use of the said plaintiffs, and being so indebted, he the said E. D. C., administrator as aforesaid in consideration thereof," on, &c., promised payment whenever he the said E. D. C., as administrator as aforesaid, should be thereunto requested.

Third count. And whereas also, the said E. D. C., administrator as aforesaid afterwards on, &c., at, &c., "accounted with the said plaintiffs of and concerning divers other sums of money from the said E. D. C., administrator as aforesaid, to the said plaintiffs before that time due and owing, and then in arrear and unpaid, and upon such accounting the said E. D. C., as administrator as aforesaid, was then and there found to be in arrear and indebted to the said plaintiffs in the further sum of \$1,000, of like lawful money, and

being so found in arrear and indebted he the said E. D. C., administrator as aforesaid, in consideration thereof promised, &c."

By the Court.—There is a misjoinder of causes of action. The first count seeks to charge defendant as administrator de bonis testatoris. The second count is on an indebtedness of the administrator personally, and not in respect of the estate, for though the expression is *money* had and received by him *as administrator*, he could not as administrator receive money for the use of the plaintiff, which would be a specific appropriation of it; whereas, all money coming into his hands *as administrator* belongs to the estate, and must go into the general administration of the estate. So of the third count. It alleges an account stated between plaintiff and defendant *as administrator*, but not in respect to the promises of the intestate, or the assets of the estate.

An executor cannot be charged as such for money had and received as executor to the use of plaintiff. Such a count is for a personal charge; plene administravit cannot be pleaded to it; the judgment must be de bonis propriis. (1 H. Blac. 108.) A count for money had and received as executor cannot be joined with a count on an account stated in relation to assets of the estate; because on this latter count the judgment will be de bonis testatoris. (14 C. L. Rep. 77; 3 Harr. Rep. 500; 2 Saund. Rep. 117, b.; 3 Wend. 244; 12 Johns. Rep. 349; Chit. Cont. 274-5; 14 C. L. Rep. 97; Steph. N. P. 235.)

The defendant had judgment on the demurrer.

Cullen, for demurrant.

Weotten, contra.



The lessee of JAMES DUFFEL and wife vs. PETER R. BURTON et al.,
tenants, &c.

A will of lands held in common, is not revoked by proceedings for partition under which the testator accepts and becomes seized of the whole in severalty. But such will does not pass the after-acquired portion of the estate.

This was an action of ejectment for certain lands in Indian River hundred.

Thomas Robinson (of Wm.,) and Miers Burton, were seized in fee

of the premises in question, as tenants in common, in the year 1826. Thomas Robinson, by will dated the 18th of August, 1840, and proved the 16th of October, 1843, devised as follows: "I give and bequeath to my nephew, Peter Robinson Burton, all of my moiety or half part of the tract of land that I now live on, situate in Angola in Indian River hundred in Sussex county, together with all of my moiety or half part of the mills and mill lots attached to the same, it being the lands that I hold in partnership with the heirs of Miers Burton, deceased, to him and his heirs and assigns forever: Provided always, that the said Peter R. Burton, shall not sell or otherwise dispose of the said lands to any other person than one of his own name and relation."

A petition for partition of the lands so held in common, was filed in Chancery at the March term, 1840. The land was valued at \$2,200, and accepted by Thomas Robinson on the 13th of March, 1841; the commissioners being of opinion that the premises would not divide without prejudice. Thomas Robinson died September 30, 1843, leaving Rhoda Duffel, wife of the plaintiff, and Sarah Evans his heirs at law; and by the subsequent death of Sarah Evans without issue, Rhoda Duffel became his sole heir at law.

The plaintiff claimed as the heir at law, of Thomas Robinson, the whole of the lands accepted in the proceedings for partition, on the ground that such acceptance was a revocation of the will, under which the defendant, Peter R. Burton claimed, and was in possession.

Plaintiff's counsel, cited, 3 P. Wms. 170; 1 Bos. & Pul. 590; 6 Ves. Rep. 219; 3 Ibid 650-56-60; 6 Cruise Dig. 120; Ibid 122-24-25-27; 4 Kent Com. 528-29-30; 2 Ves. Rep. 426-30; 7 Term. Rep. 414; 1 Ibid 577-79; Pow. on Dev. 548; 21 Law. Lib. 320-29, n., 335-49; 1 Saund. Rep. 277, n., 4; 7 Johns. Ch. Rep. 271; 2 Kinne Compl. 725; 3 Burr. Rep. 1488.

Houston and Layton, for defendants, denied that there had been in this case any such alteration of the estate as would work a revocation. A mere dissolution of the tenancy in common, is not such a change of the estate as to revoke a will. The acceptance under the Court of Chancery's decree of partition is no more. It neither takes from, nor conveys to Thomas Robinson, any thing in relation to the moiety before held by him; but only adds to it the moiety of Miers Burton; and by the acceptance, he takes simply the title of M. B., or of his heirs, subject to the incumbrances against him or them.

The estate must be divested to work a change. There must be an interruption of the seisin. The destruction of the unities by which

the estate is held, will not be sufficient to work a revocation. (6 *Cruise Dig.* § 35, 36, &c.; 2 *Leigh. N. P.* 1526; 6 *Cruise Dig.* 101, 102-5-6, § 79; 4 *Kent. Com.* 529; 1 *Term. Rep.* 576, 581.) A partition by tenants in common, does not work a revocation. (6 *Cruise* 116.17, § 97; *Ibid.* 118, § 100; 1 *Term. Rep.* 581, 590-95; 21 *Law Lib.* 825, 554-55; *Pow. on Dev.*; *Burton on real property*, *Law Lib.* 95-6; *Ibid.* 224; *Bailey on Fines* 187; *Th. Raym. Rep.* 240; 2 *Harr. Dig.* 635; *Loft's Rep.* 609.)

Plaintiff's counsel, replied that the title under partition proceedings in chancery, was a *new title*, not merely as to the moiety but the whole of the land. The law requires that the same interest which the testator had at the making of his will shall continue till his death; the smallest alteration is a revocation of the will. Did the interest of Thomas Robinson continue the same? He held as acceptor by a different title. He no longer remained in, as of his old title to an undivided moiety; but acquired a title by virtue of the assignment in chancery.

The interest of the tenant in common in the land, as land, became destroyed by the valuation: he had no longer a deviseable interest in lands, but a right to a sum of money as the valued proceeds of land; and if instead of the money he took back the land—not his moiety only, but the whole of the land—by paying for it, he became seized of a new title and a new estate both in quality and quantity. This is such a change as operates a revocation of any devise of his old moiety. The new title is after-acquired estate, such as will not pass under a previous will.

2. That the plaintiffs were entitled to a moiety of the lands by concession. One half of these lands, at all events, were acquired after the will was made. The defendants are in possession of *all* the land.

The counsel, for the defendants now stated, that they had never claimed any more than a moiety of the land under the will, as tenants in common with the plaintiff; and resisted the claim now set up to recover that part of the premises which was conceded; and they stated that the plaintiff had been in the receipt of rents as heir at law. The parties were at issue on this subject, and no proof had been offered.

The Court said, if the defendant had claimed to hold as tenant in common with the plaintiff, and defended only for a moiety, he should have restricted his defence expressly to a moiety, and not entered into the consent rule to confess ouster generally. Having confessed the ouster, as well as the lease and entry, if plaintiff recover any

part of the premises they must recover costs. (3 *Harr. Rep.* 342; 2 *Steph. N. P.* 447.)

Judge Harrington charged the jury:

HARRINGTON, *Justice*.—The case is presented on a written statement of facts agreed to. This statement leaves it uncertain to what extent defence is taken; the defendants being now willing to concede one-half the land to plaintiffs. This is a question which only affects costs, but as the case agreed upon does not make the concession, we can settle it only by the pleadings, in which the defendants admit ouster of the plaintiff generally of all the premises claimed in the declaration; and the recovery of any part will subject them to the costs of suit.

The verdict must, therefore, be for the plaintiffs for one-half, at least, of the lands in question, and costs. The real controversy is about the other half.

It is admitted that the land in question was at one time held by Thomas R. and Miers Burton as tenants in common; and that Thomas R., being so seized of an undivided moiety made his will and devised the interest which he then had in the premises to the defendant, Peter R. Burton.

The will is as follows:—"I give and bequeath to my nephew, Peter Robinson Burton, all of my moiety or half part of the tract of land that I now live on, situate in Angola in Indian River hundred in Sussex county, together with all of my moiety or half part of the mills and mill-lots attached to the same, it being the land that I hold in partnership with the heirs of Miers Burton, deceased, to him and his heirs and assigns forever: Provided always, that the said Peter R. Burton, shall not sell or otherwise dispose of the said lands to any other person than one of his own name and relation."

After the making this will, proceedings were had in the Court of Chancery between Thos. R., and the heirs of Miers B., for partition of these premises which they so held in common, and the assignment to each of his part in severalty. Commissioners were appointed to divide the property, but finding that it would not divide by metes and bounds without prejudice and injury, they determined to divide it by valuation, which is another mode of partition authorized by the law. Thos. R., accepted at the valuation; bound himself by a recognizance to pay to Miers Burton's heirs their half of the valuation, and took an assignment of the premises; by which the tenancy in common was destroyed; and he became seized of the whole in fee. He afterwards died without any alteration or republication of his

will, and without any revocation of it, unless this change in his estate, produced by the partition and purchase of the other moiety of the property, is in law an implied revocation, and does itself operate to defeat the devise.

This is a purely technical principle of law. It depends not upon the intention of the testator as collected from the will, but arises in the first place out of a high regard which the law always pays to the rights of an heir at law, the impolicy of allowing him to be disinherited unless by express words, and the doubt which the change in the estate devised raises in reference to what was the will of the deceased in respect to that estate in its new form and extent. Thus, if any one of you should by will, devise *all your land* to another person than your heir at law, and should purchase another farm the day after you made your will, and die without any republication of it, that farm would not go to the devisee, but to the heir at law. So, (to take a stronger case,) if you should make a will devising a particular farm to one of your children, and afterwards sell that farm, and then buy it back again, and die seized of it as fully as you had it when you made your will, it would not pass under the will, but go to the heir at law. And this principle has been extended in favor of the heir at law to much stronger cases than that; until it has even brought upon the law the reflection of injustice and unreasonableness. Still the principle is an established one which we must regard as one of the landmarks of property, at least to such an extent as we are bound by the decisions of those who have gone before us, and established good precedents in the law for our guidance; but in respect of a principle which has already been urged to an almost unreasonable extent, we shall be careful not to extend it any further, nor apply it to any case not falling directly within the spirit of adjudged cases.

The principle is, that any alteration of the estate or interest of the testator in the lands devised, by the act of the testator, is an implied revocation of the will; and the law requires that the same interest which the testator had in the land at the making his will should continue in him until his death; otherwise it is impossible to say with absolute certainty, what was the will of the testator in reference to this new interest; and this doubt defeats the will, the law always leaning to the heir.

The alteration in the circumstances, and seizin of the estate, which in this case is relied on as an implied revocation of the devise to Peter R. Burton, is, that after the will Thomas Robinson changed his

tenancy in common in these lands, which was the kind and quality of estate he possessed at the date of the will; put an end to that estate; and accepted another, different in quality and extent of interest, by the proceedings had for partition in the Court of Chancery. Whether such proceedings had the effect to produce a revocation of this will is the question now for consideration, and will depend upon a critical examination of the force and purposes of the chancery proceedings.

The change in the estate which is necessary to produce a revocation of the will has been held, and we consider with good reason, not to extend to a mere change in the manner of holding the estate; and the mere termination of a tenancy in common, and a holding of the same portion of the estate in severalty, will not work a revocation. The case of partition seems also to be an excepted case, even where to effect the partition a conveyance of the land be necessary. Such a conveyance by a coparcener or tenant in common, after he had made his will, has been held not to occasion a revocation of the will. The reason of this seems to be, that the object of the conveyance is really not to pass title, but to effect a severance of the manner of holding; and the estate to which the will applies being liable to this change without enlargement or restriction; the will is reasonably to be regarded and held as applying to it in its severed form of holding, as well as when it was held in common.

Partition by proceedings in chancery effects the same object without a conveyance of title. If partition be made, each tenant in common holds in severalty only the estate which he before held in common; neither more nor less; and there is no reason why this severance of possession should be held to revoke a will before made. And if partition cannot be made by metes and bounds, and the estate is appraised and accepted by one of the tenants in common, he acquires to be sure a title to his co-tenant's part, which, of course, would not be embraced by a prior will; but as to his own share, there is no change of title that ought to impair his will, or work a revocation of it, upon any of the principles of revocation by implication of law.

In this view the plaintiffs are entitled to recover one moiety of the premises of which Thomas Robinson died seized, being that portion which at the making of his will belonged to Miers Burton; and as to the moiety which then belonged to him, and was devised to the defendant Peter R. Burton, the will is sufficient to carry the same to defendants, notwithstanding the subsequent acquisition of the other

part, and his holding the whole in severalty under the chancery proceedings for partition.

Verdict accordingly.

Cullen and Saulsbury, for plaintiffs.

Houston and Layton, for defendants.



BENJAMIN BURTON vs. JOSHUA WHARTON.

Money paid towards an unexecuted contract may be recovered back in the action of assumpsit, without a tender of the balance, if the other party has rescinded the contract, or put it out of his power to comply.

The acknowledgment of a subsisting demand will take a case out of the act of limitation, without an express promise to pay.

SUSSEX. October term, 1845. This was an action of assumpsit to recover back money paid on a contract relating to lands which the defendant failed to execute. The declaration had the common counts. The pleas were non assumpsit and limitation.

The plaintiff gave in evidence the defendant's receipt, dated July 29th, 1839, for \$58, on account of the purchase of certain lands, &c., which he promised to convey on the payment of \$150 more. He also proved that the defendant within three years had said, that "he was willing to pay Burton the \$58, without interest; and that the only matter in dispute was the interest." He refused to make the deed.

The land contracted for was an undivided interest, which was subsequently valued and accepted in chancery by another owner; so that it was out of defendants power to execute his contract by a conveyance to plaintiff. On this point the plaintiff rested.

Cullen, for plaintiff, moved a nonsuit.—1st. This is an action brought to recover back the sum of \$58, paid on a contract for the sale of land; and the contract proved is to make the deed on payment of \$150 more. The defendant was not bound to give a deed until the money was paid, and the plaintiff cannot recover as for non-performance of the contract until he has tendered the money and demanded a deed. An action will not lie for the recovery back of a deposit of purchase money on a contract for the purchase of land, before tender of the balance, and demand of the deed. (20 Johns. Rep. 24, 15; 2 Ibid 207; 13 Ibid 359). The payment of the \$150 in this case was a condition precedent, and the plaintiff has no right

to bring suit for the deposit without actual payment and demand of a deed. And it makes no difference if the lands were afterwards sold to another person. (20 *Johns. Rep.* 130; 6 *Cowen Rep.* 1.) The purchaser can never bring suit in disaffirmance of the contract unless he shows that he has done all in his power to perform it. (7 *Cowen Rep.* 53; 9 *Ibid.* 46; *Chit. Cont.* 307-8)

2d. The proof is not sufficient to take the case out of the act of limitation. The acknowledgment for that purpose must be a distinct acknowledgment of the debt, and of the defendant's liability to pay it. (3 *Wend. Rep.* 532, 187; 11 *Johns. Rep.* 146; *Ang. on Lim.* 247; 1 *Harr. Rep.* 204; 3 *Ibid.* 528.)

Layton, contra.—Our courts have not followed the late English decisions on the act of limitation, which are founded on recent statutes. Such an acknowledgment as is proved here, has been held sufficient to take the case out of the statute. And again; the receipt of defendant is an acknowledgment under the hand of the party of a subsisting demand; and as such, is not barred under six years. (3 *Harr. Rep.* 528; *Ros. Civ. Ev.* 258; 2 *Saund. Pl. & Ev.* 647.)

2d. If the suit were for a violation of the contract, in not making a deed, there would be reason in requiring the plaintiff to show a payment, or readiness to pay the balance of the purchase money. But where it appears that the vendor has rescinded the contract, the vendee may sue for the deposit without further payment or performance on his part. It is expressly proved: 1st. That before bringing this action the defendant said he could not comply with the contract and would not give the deed. 2d. That his interest in the lands which he contracted to sell to plaintiff was divested by a decree in chancery, and it is no longer in his power to comply with his contract. The law cannot require such a vain thing as the demanding a deed of a man who has no power to make one; nor the dangerous experiment of paying \$150 to an insolvent man, to get a right of action for \$58. (*Archb. N. P.* 174, 184; *Chit. Cont.* 307.)

Cullen replied.

By the Court.—The principles of law which govern this case are not doubtful. It is true that a vendee of land having paid a deposit cannot put an end to the contract, and sue for the deposit, while the other party is ready and willing to go on with the contract. Nor in any case while the contract is unrescinded, and the other party ready to comply, can a suit be maintained for the deposit, nor for damages, without showing that he has done all that was required of

him. But where the vendor has rescinded the contract, (and his positive refusal to comply is evidence of the rescinding the contract) the vendee may also treat the contract as rescinded, and sue for the deposit, without doing any thing further. So where the vendor has absolutely put it out of his power to comply with the contract, this is evidence of a rescinding of the contract, and the vendee may sue for the deposit. (*Ros. Civ. Ev.* 139-40-41-42.)

This is an action of assumpsit for money had and received, and not a special action on the agreement to purchase the land. The principle of this action is, that it is not according to equity and good conscience that the defendant shall retain the money. And is it conscionable that a man shall receive part payment for land which he contracts to sell, and then not only refuse to make the deed, but sell the land to another, and receive the purchase money, and then refuse to pay back the deposit?

As to the act of limitation we shall leave it to the jury to say whether there is proved an acknowledgment by the defendant of a subsisting demand; and if they shall think so, it is evidence of a promise, and takes the case out of the act of limitation.

Nonsuit refused; and the case submitted to the jury.

Verdict for plaintiff.

Layton, for plaintiff.

Cullen, for defendant.



BRITTINGHAM *vs.* COLLINS & DAVIS.

The court will not tax the costs of witnesses summoned to support the character of other witnesses, and not examined.

REPLEVIN. In this case after a trial and verdict for the defendants, *Mr. Houston*, for plaintiff, moved the court to disallow the costs of five witnesses who were summoned by the defendants and not sworn.

Mr. Cullen said they were summoned to support the character of one of the witnesses in the cause, who they had heard was to be attacked; and he offered an affidavit to this effect, referring to *Marshall vs. Layton*, 2 Harr. Rep. 344.

But the court refused to allow the attendance of these witnesses to be taxed among the costs, saying that a great number of witnesses

had been examined by the defendants to the same points, and the costs already greatly increased in a case of very trifling importance. The verdict, which was for the full amount in controversy, was only for \$21 49, and the costs over \$200. They said also, it would be a very dangerous principle to settle, that a party might at the expense of his opponent, summon all the witnesses he might choose, to support his case, and then as many more, to support each of these witnesses. There is nothing raised by the issues in the cause to authorize the summoning these witnesses.

Verdict for defendants.

Mr. Houston, for plaintiff.

Mr. Cullen, for defendants.



DASHIELDS R. PRETTYMAN, d. b. app'l't. *vs.* WM. D. WAPLES'
Executor, p. b. resp't.

SAME *vs.* SAME.

How to declare on a note signed by a wrong name.

The plaintiff on an appeal from a justice of the peace cannot take a non pros at pleasure. The defendant in such case may recover an amount even beyond the magistrate's jurisdiction.

A probate need not be produced unless called for.

Verdict set aside for an error in calculating interest, and for surprise, though the party might have had notice by requiring the pleas to be drawn out.

THESE were appeals from the judgments of a Justice of the Peace in an action of assumpsit on a note not under seal; and in debt on a sealed instrument, dated June 17, 1817, and signed Robinson Dashields Prettyman, for \$37 50. By agreement the two cases were tried together. The pleas were non assumpsit; non est factum; set off; act of limitation, &c. Both declarations were against D. R. Prettyman, the first counting that he signed the note by the name of R. D. Prettyman.

The plaintiff below offered to prove that Dashields Robinson Prettyman was known also by the name of Robinson Dashields Prettyman, which was objected to.

Cullen.—If a party sign a note by a wrong name, he must be declared against by that name. The instrument declared on is a note executed by D. R. P., and the proof offered is of a note by R. D. P.

This is a variance. (2 *Saund. Pl. & Ev.* 373; 3 *Taunt.* 504; 5 *B. & Ald.* 682.)

Layton.—It is a pro narr., and sets out the instrument as it is. The pro narr., if drawn out would be thus: D. R. P., was sued by plaintiff; and thereupon the said plaintiff declares that on, &c., the defendant D. R. P., by the name of R. D. P., executed the note, &c.

Court.—This case is like the case in 3 *Taunton's Reports*, which is express against plaintiff; but we do not at present see the reason of that decision; and we will hear the proof, subject to the opinion of the court on this question, or to a motion in arrest of judgment.

It was then proved that the defendant went by both names, and had acknowledged the execution of this note by the name of R. D. P. He said, he sometimes, in his younger days, wrote his name thus.

On the part of the defendant evidence was offered, under the plea of set-off, of a settlement between plaintiff and defendant in 1832, at which time the defendant assigned Waples a judgment against Thomas C. Waples, Isaac Waples, Clowes and Clark, for \$400. Waples deducted \$160, in full of the defendants paper which he held, and which he promised to deliver up at some future day; paid defendant \$50, and agreed to pay him the balance, viz. \$190, when he collected the judgment against Clowes and Clark, which he afterwards did collect.

Mr. Layton, for plaintiff, now offered to take a nonsuit, which *Mr. Cullen* objected to.

By the Court.—The proceeding on appeal is regulated by the act which gives this court, as well as the justice of the peace, jurisdiction; the justice, original; this court, appellate jurisdiction. It provides that the proceeding shall be "by declaration, pleadings, and trial," as in actions originally instituted in this court. But the act further authorizes either party on a trial of appeals to make demands against the other, and the jury to find a verdict for either party; which is contrary to proceedings in other actions in this court. This makes both parties, as it were, plaintiffs; the original plaintiff, for his demand; the defendant for his set-off; and it is not competent for the party who stands as plaintiff to prevent a recovery by the other party, of his cross demand, by taking a nonsuit.

It is true generally, but not universally, that the plaintiff in an action originally instituted in this court, may stop the case when he pleases, by suffering a non pros at his own cost. This does the defendant no wrong. But it would not be so, even in the action of replevin, where the defendant pleads property. At all events, this

matter is governed by the terms of the act of assembly which gives the defendant, on appeal, a right to bring forward and recover a demand against the plaintiff. And it has been decided by this court, that he may, upon such demand, recover a sum exceeding \$50. (*3 Harr. Rep. 279, Records vs. Bacon.*)

The court refused to order a non pros; and the defendant went on, and obtained a verdict for \$395 26.

Whereupon, *Houston* and *Layton*, for plaintiff, moved for a new trial on the ground: 1st. That there had been no probate offered. 2d. Because the verdict was against the evidence, as ascertained by the statement returned by the jury; and also, on the ground of surprise; and of after discovered testimony.

Houston.—1st. The act of assembly requires that before an executor shall pay a demand against the estate there shall be a probate. He could not be allowed for such payment without probate; on appeal any such payment would be struck out of his account, and a subsequently made probate would not help him. The party then is bound to produce a probate not merely when called for, but before a verdict can be rendered in his favor.

2. We were certainly surprised by the production of this large claim, on an appeal from a judgment in our favor, before a justice of the peace. True, there is a plea of set-off; but it was not drawn out, and we could not be taken to have notice of such a strange demand as this.

3d. The proof as to the collection and payment of this, Clowes and Clark judgment to defendant, is at least, conflicting. There is great doubt on the subject, and the executor ought to have an opportunity of clearing it up.

Cullen.—1st. As to the probate.

[The Court stopped Mr. Cullen on this point. The probate is in time if made when called for. It must be produced by the party plaintiff in any action against an executor, and if not produced the court are required *on motion* to give judgment of nonsuit. As the judgment must be asked for on the ground of the non-production of the probate, a motion which must be made before verdict, it follows, that the probate must be demanded, and if then not produced, the nonsuit follows. As to the necessity of a probate to protect the executor in his payment, the judgment is his protection; he would be compelled to pay it, and of course, would be allowed without further voucher.]

2d. As to the calculation of interest there is no evidence of a mis-

take, and can be none, for the jury will not be allowed to impeach their own verdict. (2 Chit. Rep. 321; 18 Com. L. Rep.)

3d. There is not sufficient evidence that the balance of the Clowes and Clark judgment has been paid to D. R. Prettyman.

4th. As to new discovered evidence. It must not be merely cumulative; nor such as might by ordinary diligence have been discovered before the trial; nor for the discovery of new witnesses to the same facts. The affidavit of the discovery of new testimony must state what that testimony is, that the court may judge of its materiality. (2 Hall's Rep. 391; 5 Wend. Rep. 114; 15 Johns. Rep. 210; 8 Ibid 84; 2 Caine's Cases 129, 133; 1 Ibid 124, 24; 4 Johns. Rep. 425, 225, 210.)

It is no ground for a new trial that the party was surprised by the defence; nor for want of evidence which the party might have produced with due diligence; nor where the party was apprised of the defence; nor where a witness proved a fact to the surprise of a party. (9 Johns. Rep. 76; 1 Wils. Rep. 98; 2 Binn. Rep. 582, n; 2 T. Rep. 113; 18 Com. L. R. 302; 11 Price's Exch. Rep. 303.)

The Court set aside the verdict, on the ground that it was against the evidence on a point in reference to which there was no conflict of testimony. The verdict was rendered on the plea of set-off, as to which the evidence uncontradicted, was, that Prettyman sold a judgment to Col. Waples, for \$400; and the terms of sale were these: \$160, which Prettyman owed Waples, was to be deducted; Col. Waples paid \$50 in cash, and the balance of \$190 was to be paid when he collected the judgment and not before. He collected the judgment in 1834, from which time only was he bound to pay interest on the \$190; which by calculation, shows that the verdict is erroneous by about \$90. It is not to be disguised, also, that the matter of set-off here presented, was entirely unexpected to, and unknown by this plaintiff, who is an executor, and the pleading gave him, in fact, no notice of it. Yet it cannot be called a case of legal surprise, for plaintiff had the right to call upon the defendant to specify his matter of set-off, and it was his neglect that he did not do it.

Verdict set aside, and new trial granted, on the terms of paying all the costs of the trial, and of this motion; and of going to trial on the merits, on the plea of set-off.

Rule absolute.

Houston and Layton, for plaintiff.

Cullen, for defendant.

JAMES P. LOFLAND, d. b. appellant *vs.* WARREN JEFFERSON, p. b. respondent.

Execution process can be issued only to the sheriff in office, or his "immediate" predecessor.

A sheriff is not entitled to "dollarage" for money not made by him; unless it is paid before the return day of his writ, or whilst he has process in hand, authorizing him to levy the money.

A sheriff has no power to execute process, after the return day.

Payment to him when he has no writ in hand, authorizing the levying of the money, will not discharge the debt.

SUSSEX. October term, 1845. This was an appeal from the judgment of a Justice of the Peace, in an action of assumpsit, for sheriff's fees, on execution process, sued out by the appellant, and placed in respondent's hands, for execution.

The matter in dispute was a charge for dollarage on the amount of an execution, at the suit of appellant, against L. Layton, which was in the sheriff's hands more than thirty days, and then paid to plaintiff, after the return day of the writ.

The judgment against Layton, was dated August 28, 1825; an alias *fi. fa.* was sued out to October term, 1833, and placed in sheriff Jefferson's hands; it was returned "levied," and the costs endorsed, \$4 50. Successive writs of venditioni exponas were issued to the same sheriff, every term, up to October term, 1838, all of which were returned, "goods unsold for want of buyers," except the last, which was returned, "settled to plaintiff," and dollarage endorsed, \$24 15. Warren Jefferson was elected sheriff, in Nov., 1832; George Frame was elected in 1834; and Purnel Johnson, in Nov., 1836. These executions were levied on the defendant's goods, which were advertised, but no sale was made, being stayed by orders of plaintiff; the last writ was held up by plaintiff's orders. Sheriff Jefferson sent him a statement of the debt and all costs, including the dollarage, which plaintiff collected of Mr. Layton, and afterwards refunded to him. The writs were all delivered to sheriff Jefferson, by order of the plaintiff; who from time to time gave directions about them to the sheriff. The last writ was returnable to October term, 1838; but it was not then returned. The money was paid to plaintiff, in 1840, or 1841, and sheriff Jefferson then returned it "settled to plaintiff." At the time it was issued, to wit: in July, 1838, Purnel Johnson was sheriff of Sussex county, and Warren Jefferson was not his immediate predecessor.

Cullen.—When a writ is placed in the hands of the sheriff, to levy money, and he retains it for thirty days, after which the money is paid to the plaintiff, the sheriff is entitled to his fees for dollarage. At common law, the sheriff is authorized to charge fees not only for what he does, but for what he could have done by virtue of the execution. Otherwise he would have an interest to push debtors to the extent of the law. And if an execution is placed in the sheriff's hands, and remains there thirty days, he is entitled to dollarage if the defendant pays the plaintiff ten years after, though the sheriff do not even make a levy. And it is not necessary that the process shall have continued in the sheriff's hands, all the time intervening between the first writ and the payment.

Layton, contra.—The sheriff derives all his authority from the law and his writ. He has no right to fees, unless as sheriff, or ex-sheriff. He is not entitled to any costs as such, for anything he may do as agent of the plaintiff. His costs are regulated by his official acts. If an execution be in the sheriff's hands thirty days, and be paid to the plaintiff afterwards, whilst the writ is in the sheriff's hands, and operative, he is entitled to dollarage, and not otherwise. The plaintiff has a right to stay his execution, or revoke it; and if he does so, the sheriff is not entitled to any dollarage. By the terms of the fee-bill, the sheriff is not entitled to any fee for any service not rendered, nor for any fee not endorsed at the time of the return. (*Dig. 242.*)

As to the holding writs up by the sheriff, beyond the return term, it is all illegal, and cannot be authorized by any orders of the plaintiff. The command of the writ, and the rules of court, require the writ to be returned *at the term*. There is no time marked for the return of this writ, and the legal presumption is, that it was returned at the October term, 1838; after that it was a dead writ, and the sheriff could do nothing under it. When this writ was returnable, and ought to have been returned, there was no dollarage due; for the debt was not paid for two years after; and at the time the debt was paid, W. Jefferson had no right to collect the money, or to charge fees. Even if he could afterwards earn fees, he would have forfeited them by neglecting to endorse them on the return to October term, 1838. The sheriff has no authority under the writ, after the time when it is returnable. Under this writ the sheriff could do no act after the 8th of October, 1838. (*46 Law Lib. 94; Sew. Shff. 104; Cro. Eliz. 180; 2 Esp. Rep. 585; Sid. Rep. 229.*) The sheriff's recognizance binds him to well and truly execute all process without delay. He is bound to return writs of *fi. fa.*, on the

second day of the court to which they are returnable. (*Dig.* 454; *Ibid* 207-8; 2 *Harr. Rep.* 161.) Our law authorizes certain writs of execution to be issued to an ex-sheriff, that is, the *immediate predecessor* of the sheriff in office. This writ issued to Jefferson, when he was not such predecessor, and is illegal. (*Dig.* 211.)

When the judgment on which this writ was issued was paid by Mr. Layton to the plaintiff, there was no execution process in existence. The old sheriff, Jefferson, had no right to make any endorsement on a writ which either was returned, or should have been returned, two years before.

Cullen.—1st. Admitting that the last writ was issued improperly to a person who was not the *immediate* predecessor of the sheriff; this is the case of a plaintiff in an execution resisting the sheriff's claim to fees, on the ground that he was not the proper officer to whom the writ should have been issued. Yet the plaintiff himself had the writ directed to this officer. Shall he be permitted to deny it? It is not a question between the defendant and the sheriff.

2d. Poundage, by the common law, and dollarage, under our act of assembly, is due not merely upon the collection by the sheriff, of money, by sale or otherwise; but in every case where the debt is settled to the plaintiff, thirty days after levy. The sheriff is entitled to dollarage, even on an illegal writ, if the court has jurisdiction. Even where the execution was set aside.

The principle on which dollarage is allowed, is the sheriff's risk: After the levy he is responsible for the safe keeping of the property, and if he gets no dollarage, he incurs this risk without compensation. (*Watts. Shff.* 57-126; 2 *Tidd Pr.* 1039; 1 *Caine's Rep.* 192; 2 *Harrison's Dig.* 459; 5 *T. Rep.* 440; 17 *Wend. Rep.* 14; 9 *Ibid* 435.

A verdict was taken for plaintiff, for \$33 45, if the court shall be of opinion that the plaintiff, as late sheriff, was entitled to dollarage on writ No. 87, to October term, 1838, under the proof in this cause; otherwise, for the sum of \$10 10.

By the Court.—1. The first ground of defence is, that in respect to the last three writs the fees claimed cannot be recovered, because they were not issued to the sheriff in office, or his immediate predecessor in office, but to sheriff Jefferson, a previous sheriff.

We consider this mode of directing execution process irregular and illegal. Execution could be issued only to the sheriff in office, until by the act of 1788, authority was given to his "immediate"

predecessor in office to finish execution process begun by him; but this does not extend beyond the immediate predecessor, and these writs were irregularly issued to sheriff Jefferson. But they were so issued by the order of Doct. Lofland, the defendant here, and he ought not now to object to this irregularity, but should pay as he in fact received from L. Layton the fees endorsed on them, except the claim for dollarage.

2. The construction of the fee bill in reference the sheriff's right to dollarage is not without difficulty, as the provisions of the act seem at first view, and are perhaps in reality, inconsistent. Our duty is to give effect to the whole if we can, and if we cannot, to maintain the general purpose of the law, even if it necessarily conflicts with the apparent meaning of certain clauses of the act.

The first general principle is, that the sheriff's right to dollarage, as well as any other fee, is to be maintained under our act of assembly, and not by reference to any common law rules; and though it may well be, that in England many of the sheriff's perquisites arise from his extraordinary liabilities as a public officer, yet in this State his liabilities are not always the same, and his compensation is always derived under the act which fixes the fees of public officers.

That act is also to be taken strictly. It expressly declares (263,) that "no fee shall be allowed for any service until it shall be performed; every provision allowing a fee shall be construed strictly, and the fee under it shall not be allowed for any service which shall not come within the explicit meaning of the terms." Each service has its fixed fee: for levying an execution on goods, with inventory and appraisement; for advertising goods, so much for the first time, and so much for a second or third advertisement; and for selling goods on execution, what is called dollarage, at the rate of three cents per dollar on the money made by the sale, and legally applied to execution or to landlord's rent; but the sheriff shall not have dollarage on money applied to an execution in the hands of another officer, or to rent distrained by another officer: if an execution be levied on goods or chattels and settled without a sale, after the expiration of thirty days from the levy and notice, the sheriff shall be entitled to dollarage: the item of dollarage shall not accrue until sale or settlement as aforesaid. (*Dig. 241.*)

In the present case a levy was made on an execution at the suit of J. P. Lofland, the defendant, against Lowder Layton, previous to the October term, 1833, and the money was paid by the defendant in the execution to Doct. Lofland himself, in the year 1840 or 1841,

there being at the time no writ in the hands of sheriff Jefferson, or any of his successors, authorizing a collection of this debt from Mr. Layton. The last writ which issued was returnable to October term, 1838; to which term it ought to have been returned, with a certificate of what had been done by virtue of it up to that time, which would have embraced neither a sale of the goods, nor levy of the money, nor any other service entitling the sheriff to endorse a charge for dollarage.

The writ was then *functus officio*. Sheriff Jefferson had no right to sell upon it; nor any right to receive and give a discharge for the money. If the money had been paid to him by this defendant, it would not have satisfied the judgment in case the sheriff had not paid it over to the plaintiff.

Being thus properly returnable, and to be treated as if returned at the October term, 1838; with no act done by the sheriff entitling him to dollarage; and no further process directed to him under which he could earn the dollarage, the subsequent payment of the money by the defendant, L. Layton, to Doct. Lofland, did not entitle sheriff Jefferson to dollarage. It was not money levied by any execution process. This is proved by the fact, that if a subsequent writ had been issued to sheriff Steel, or sheriff Smith, and the money levied by a sale, he, and not sheriff Jefferson, would have been entitled to the dollarage. And even if an execution had been issued against Mr. Layton, by any other creditor, and delivered to sheriff Smith, by virtue of which he sold goods applicable to this execution, he, (if any one,) and not sheriff Jefferson, would be entitled to dollarage on the sum so applied to it.

This proves that sheriff Jefferson did not by the levy alone acquire a right to dollarage on this debt. Yet, it is said, that by the act of assembly, if an execution be settled without a sale after thirty days, the dollarage shall accrue. This must be taken in connection with the whole act, and must have reference to a writ in the sheriff's hands under which he might make a sale or levy the money. It is not so restricted in terms, but it is so by reference to the whole act. It is a provision for the benefit of the defendant; to take away any interest which the sheriff might have to make sale, and to save him his dollarage on a settlement without sale just as if he had sold. But this can only be whilst he has the right to sell. The right to dollarage cannot, by the levy, be vested whenever the debt may be settled; because even where a further writ issues in the same case to another sheriff, and the money is raised by a sale; the sheriff

selling gets the dollarage, and not the sheriff levying ; much less shall the sheriff levying be entitled to dollarage at any time after, when the defendant voluntarily pays the debt to the plaintiff, if he could not get it even where the money is finally levied by pursuing the same process out.

The clause of the act of assembly which speaks of a certificate for dollarage received by the sheriff when there is no execution in his hands, if compatible with this opinion at all, has reference to the case where an execution has been levied and returned, and the property is sold by the same or another sheriff, and the proceeds applied to the returned execution : the officer applying it in that case gets the dollarage, and is bound to certify it to executions not in his hands.

Layton, for appellant.

Cullen, for respondent.



EDWARD M. ROSS, appellant, p. b. *vs.* GEORGE W. GREEN, d. b., respondent.

A wager on a horse-race out of the jurisdiction of the State is not illegal.

APPEAL from the judgment of a Justice of the Peace. Pro. narr. in assumpsit against a stake-holder for a sum of money deposited in his hands on a horse-race.

The evidence was, that the race was made up and run in the State of Maryland, and the bet made there. It was conflicting as to the result of the race.

One of the witnesses admitted on cross examination, that he had a small wager on the result of the race, and he was objected to as having a disqualifying interest; but the court decided that he was not disqualified ; the interest being in the question, and not in the result of the suit.

BoOTH, *Chief Justice*, charged the jury :—That horse-racing was prohibited by the laws of this State, or betting on horse-racing ; but this must be taken in reference to the jurisdiction of the State. The law will not lend its aid in execution of any contract which is contrary to law, or against public policy, or good morals. Any bet therefore on a horse-race, instituted and run in this State, would be

illegal and void; but this court cannot regard a horse-race as illegal which is run in the State of Maryland, where racing is not prohibited; neither can we regard a bet made on such a race as unlawful, here or there. Neither the race, nor the bet, is immoral in itself; nor is it prohibited by our act of assembly, which does not reach the case. If, therefore, this race in reference to which the bet was made, was run in Maryland, and the appointed judges of the race have decided it against the plaintiff, he cannot recover back from the stakeholder the money placed in his hands. Whether their decision was right or wrong is not open for discussion, as they are the chosen judges of this question.

Verdict for the defendant.

Woolten, for plaintiff.

Cullen, for defendant.



The schooner WILLIAM THOMAS and N. REDDEN, d. b. appellants *vs.*
STEPHEN W. ELLIS, p. b. respondent.

A part owner of a vessel, who is not the master, or ship's husband, cannot order repairs, and sue his partner at law for his share of the expense.

APPEAL from the judgment of a Justice of the Peace.

This was an action by Stephen W. Ellis, the owner of one-half the schooner William Thomas against Nehemiah Redden, whom he alleged to be the owner of the other half, for a share of repairs done, and necessaries furnished to the vessel.

It appeared in evidence, that the repairs were done at the port where both plaintiff and defendant resided; and were ordered by the plaintiff but not by the defendant, who was not consulted on the subject. The repairs were paid for by Ellis, who now sued the defendant for his half of the amount expended, in an action of indebitatus assumpsit. The first question was, whether one part owner of a vessel could, without the order or consent of his co-owner, do necessary repairs on a vessel and recover from him his proportion of the expenses, in an action of indebitatus assumpsit.

The Court said, such an action will not lie between general partners. The difficulty of settling partnership accounts in an action at law, and the wide range to which conflicting claims of partners on each other in the course of partnership dealings, would lead, neces-

sarily requires that the partnership business should be settled and a balance struck, before one partner should be permitted to sue another in an action at law, proceeding upon an implied assumption to pay the amount demanded.

The same principle is, to a less extent, applicable to part owners or tenants in common of a chattel; but in relation to part owners of a vessel, the rights and liabilities are further modified by the kind of property. In vessel property; for its preservation and usefulness, it is often requisite that some person should be authorized to procure necessaries, and bind the owners, or the vessel itself. Thus, the ship's master has extraordinary remedies for liabilities incurred by him, and can bind the owners, or the ship. So a ship's husband, who is the agent of all the owners, appointed for this purpose, may bind the owners for necessities found the vessel; for this is his business, to fit out and supply the ship, and manage the business for all the owners.

But a part owner of a vessel who has not the general legal authority of a master, nor the special authority of a ship's husband or agent, cannot furnish repairs and supplies at the port where his co-owners reside, and bind them without their consent and orders. He has no right to represent the other owners as the master or ship's husband has; nor do persons furnishing supplies on his order, give credit to all the owners, but only to the individual owner giving the order. Not so with the master or husband, who represents all the owners and pledges their credit. If, therefore, the other owners are not liable to third persons furnishing supplies on the order of one owner, much less are his co-owners liable over to him, in an action founded on the implied assumpstion, to repay him a portion of the expense incurred by him.

Cullen, for plaintiff, cited 1 Steph. N. P. 308; 1 Johns. Rep. 138, 139; 2 Com. L. Rep. 303-4; 5 Wend. Rep. 274; 1 Ch. Pl. 39, n. 2; 3 Kent's Com. 39, 40.

Woollen and *Houston*, for defendant, cited 1 Ch. Pl. 25-6; *Abbott on Shipping* 103, 104, [83,] 112, [92,] 113; 7 Bingh. 709; [20 Com. L. Rep.;] 3 Kent's Com. 151, 156-7, 355; *Ibid* 133; 7 Johns. Rep. 307; *Abbott on Ship*. § 19.

Verdict for defendant.

GEORGE WATERMAN, Jr. *vs.* ELIJAH BARRATT.

A security given whilst in prison, on lawful process, cannot be invalidated for *duress*. The want of consideration for a negotiable instrument, cannot be set up against an indorsee without notice.

A release from arrest is a good consideration for a note.

CAPIAS case on two promissory notes, drawn by the defendant to George Waterman, and endorsed to plaintiff, dated Cincinnati, January 18, 1842, for \$255 20, and \$5.

The depositions proved the execution of the notes, and the endorsements, and consideration; being other notes due from Conover, Campbell & Barratt to Western Smith, assigned to Waterman; and on which Barratt was under arrest at the time these notes were given. Waterman retained the note of C., C. & B. The defendant admitted them due when arrested here.

Layton, for defendant.—The plaintiff has voluntarily undertaken to show the consideration of the notes declared on, and has failed. He has proved that the notes were given by Barratt, whilst under arrest, as a collateral security for a debt due from Conover, Campbell & Barratt, Waterman having retained possession of the note of C., C. and B.

The defence of duress may be made under non-assumpsit pleaded, in the action of assumpsit, though it must be pleaded specially, in actions on sealed instruments. (1 Chit. Pl. 470-71; *Kinne's Comp. April, 1845, p. 73; 5 Hill's Rep. 154.*)

Cullen.—The defendant, on being arrested here, recognized the notes and offered to give his bond.

As to consideration; whatever is a detriment to one party or an advantage to the other, is a consideration. The release of defendant from arrest, in Ohio, and the striking off the suit there, was a sufficient consideration for the notes then given. But additionally, we have proved that these notes were just for the amount of a debt due by defendant on the note of C., C. and Barratt, which was a good consideration. The circumstance that these notes were given whilst the defendant was under arrest, does not vitiate them, because that arrest was lawful, and for a just debt, recognized as such by the defendant.

Again: the notes in this case were endorsed before maturity; the suit is by the indorsee and the consideration is not inquirable into. Even, as between the original parties consideration is not to be in-

quired into without notice, and no notice of this defence has been given us.

The Court:

Booth, Chief Justice.—In transitory actions the creditor has a right to pursue his remedy, and collect his debt any where he can find his debtor. The first question is then, did Elijah Barratt execute these notes? and did George Waterman endorse and assign them over to the plaintiff? If this is proved, the plaintiff is entitled to recover the amount, unless the other grounds of defence will avail, which are, that the consideration for these notes is not proved, and that they were given by Elijah Barratt, whilst under duress of imprisonment.

The action here, is by an endorsee of the notes before maturity; and as between the endorsee and maker, the want of consideration cannot be set up as a defence, unless it be shown that he had notice of such want of consideration. (3 *Harr. Rep.* 387.)

But as between the original parties the defence could not avail, if it be shown that any consideration existed; and the release of the defendant from the previous arrest was a good consideration; for any benefit to the defendant, or detriment to the plaintiff, is a sufficient consideration. (1 *Wh. Selc.* 45.)

As to the defence of duress, to avail the party it must be shown to have been an illegal imprisonment, and not an arrest by virtue of legal process, unless improper force or unnecessary constraint be used. (1 *Saund. Pl. & Ev.* 444.)

Verdict for plaintiff, \$317 02.

Cullen, for plaintiff.

Layton, for defendant.



MARY W. LYNCH, Ex'x. of JOSEPH I. LYNCH, dec'd., deft., vs. ZADOCK HILL, plff.

A justice of the peace can render judgment only on a day to which the case stands adjourned; but objection cannot be taken to this if the parties appeared and went into trial on another day.

SUSSEX, October term, 1845. This was a certiorari directed to Justice Edward Dingle, to send up the record and proceedings in a

certain action at the suit of Zadock Hill against Mary W. Lynch, executrix of Joseph I. Lynch, deceased.

The justice returned the record of an action commenced by summons on the 25th of May, 1844, upon a promissory note under seal, executed by Joseph I. Lynch, on the 7th of May, 1838, for \$50, with two credits endorsed amounting to \$40. The summons was made returnable on the 8th of June, 1844, "at Waples & Hickman's store-house, before Edward Dingle aforesaid." This process was returned "summoned." The defendant appeared. Plaintiff produced the note with the credits endorsed. The next entry was "Plaintiff and defendant both appeared on the 22d day of this inst., June, and after hearing the proofs and allegations of both parties, I gave judgment in favor of plaintiff against defendant as of assets, for debt \$24 68, costs of suit 56 cts.—\$25 24."

The principal exceptions were: 1st. That the warrant of summons did not sufficiently ascertain the *place* of appearance of the parties. 2d. That the return day mentioned in the summons, was the 8th of June, which was the day of trial; and judgment was rendered on the 22d of June, without any regular continuance of the cause.

The *Court* thought the last exception would have been a fatal objection to the judgment, but for the appearance of both plaintiff and defendant on the 22d of June, and the fact that they both entered into the trial that day, without objection.

Judgment affirmed.

Layton, for defendant below.



MATTHEW and DANIEL KINNIKEN, defendants *vs.* JOSHUA KINNEY, plaintiff.

A justice of the peace may make a second adjournment of a cause of his own motion, without affidavit.

In a suit against two persons the court will not imply that they are partners, but regard them as joint debtors, to support the judgment.

SUSSEX, October term, 1845. This was a certiorari directed to Justice Windsor, who returned a record thus: "Joshua Kinney *vs.* Matthew and Daniel Kinniken. Plea, debt \$50, demanded on account. Summons issued 21st December, 1844, to constable Moore, returnable 4th of January next. And now to wit, January 4th, 1845,

summons returned personally served upon the defendants, Dec. 30, 1844; saith, I. T. Moore, constable. Defendants not appearing, case continued to the 18th inst. And now, to wit, January 18, 1845, defendants having failed to appear, the case (in consequence of the unfavorableness of the weather) continued to the 25th instant. And now, to wit, January 25th, 1845, defendants having failed to appear, and having heard the allegations and proofs of the plaintiff, judgment is hereby given in favor of the plaintiff against the defendants, the 25th day of January, 1845, by default the return having been first verified as by law required; for debt, \$50; cost, 69 cents."

The exceptions were:—1st. Because the action was brought against the defendants as partners or joint debtors, without giving the several names of the partners or joint debtors, or the trading name of the firm. 2d. Because the second adjournment of the cause was illegal, being without any oath or affirmation as required by law.

The Court affirmed the judgment. It does not appear by the record, that the suit was against the defendants *as partners*, and it will not be so inferred. They are to be regarded as *joint debtors*. As to the second adjournment; the act (*Dig. 332.*) authorizes the justice to adjourn the proceedings from day to day for his own information, or the purposes of justice. It requires him to make one adjournment on the application of either party, if the sum demanded exceed \$5 33; "but no subsequent adjournment shall be granted, unless it shall appear to the satisfaction of the justice, by the oath or affirmation of *the party applying* for the adjournment or otherwise, that such party is not prepared to go into the trial with safety, and that such want of preparation is not owing to design or to not using due diligence." This restriction has been construed to apply only to adjournments granted on the application of a party, and not to adjournments made by the justice on his own motion for the purposes of justice, otherwise it would be often impossible to decide cases with the necessary deliberation. And by section 5 of the act regulating this jurisdiction, it is also provided, that on the non-appearance of a defendant pursuant to an adjournment, the justice may either give judgment by default, or may adjourn the cause to a *further* day, which gives him the power of his own motion to make a second adjournment without affidavit. Additionally, this second adjournment was made for the advantage and benefit of the party who now excepts to it.

Judgment affirmed.

Layton, for defendants.

GEORGE W. CUMMINS *vs.* PRESLEY & ENOCH SPRUANCE.

A party may recover damages for a collision on a public highway who may not have been entirely without fault, if his fault did not contribute directly to the collision.

No one has a right to obstruct a navigable stream, but the occasional grounding of a vessel is an obstruction incident to commerce and not unlawful.

Duck Creek, in Kent county, is a common highway for all vessels whose draft of water permits them to navigate it.

In case of collision of vessels the liability for damages depends upon the immediate causes. The gist of the action is negligence, misconduct, or want of nautical skill.

A vessel out of place, is not to be run into with impunity, if she may be avoided, by the use of ordinary skill and care.

Accidental injuries do not give any right of action; nor injuries immediately resulting from the mutual fault of both parties.

The measure of damages is the injury sustained or cost of repairs. The loss of profits by the voyage is too remote and consequential.

KENT, October term, 1845. This was an action of trespass on the case for damages arising from a collision of vessels. The plea was, not guilty.

The plaintiff stated his claim to be for damages arising from a collision of vessels, caused by the negligence of defendants' captain. The plaintiff's schooner was lying aground and loaded in Duck Creek, near Cork's Point, when she was run into and materially damaged by defendants' sloop, Sally Ann, and obliged to go into a different port from that to which she was bound, to be repaired. Plaintiff's vessel, though aground in the creek, was lying so that other vessels could pass on either side, there being on one side seventy-eight feet of navigable water. Defendants' captain was warned to take that side but refused; and, attempting to pass on the other side, run into plaintiff's schooner. He called a number of witnesses to prove this case.

Frame opened for the defendants. He assumed, 1st. That if the jury should think this was an unavoidable accident, not owing to the negligence or want of skill in the defendants' captain in the management of his vessel, there could be no recovery, but whatever party suffered damage must bear it without redress. 2. Even if the defendants' captain was guilty of negligence and want of due care; if the jury should also be of opinion that the plaintiff's captain was in any material degree guilty of negligence by his position or conduct, the plaintiff could not recover. In other words, if the collision was the result of the common blunder, or misconduct or neglect of both

parties, the jury could not apportion the degrees of negligence between them, but must find for the defendants.

He called witnesses to prove that the plaintiff's schooner was unfit for that navigation; that she was not in the habit of going there, this being her first trip; that she grounded near the middle of the creek, and that the plaintiff voluntarily loaded her down after she grounded, so as to prevent her from floating with the next tide, and to keep her in a position of danger, and of obstruction to others. He maintained that though Duck Creek is a navigable stream and free to all persons and all vessels that can go in it, still it is not navigable for others; and no one has the right to experiment upon the free navigation of others by squeezing in improper vessels, and stopping up the navigation. Such an obstruction is a public nuisance; generally prejudicial; and, if it results in the accident of a collision, the party has no right to complain.

The plaintiff, in reply, called nautical men to prove that it would have been impossible with the wind and tide as it was, and the mainsail of the sloop down, jib up, and hauled to windward, to have got the sloop into the schooner; as the jib must have directed the bow to shore and kept her in the mud. His witnesses also reaffirmed their statement that the mainsail of the sloop was not down more than from one-third to a half. They attributed the collision to this.

Smithers, for plaintiff, to the jury.—We agree that we must prove negligence or want of skill in the defendants, or those in charge of their vessel. They are liable for the negligence of their servants. But we deny the position that if both were negligent, plaintiff cannot recover; the question is whether the defendant by due care on his part, could have avoided the accident. If the collision was the result of *inevitable* accident the plaintiff cannot recover; if of the negligence or unskillfulness of defendants' captain, as the proof shows it was, the plaintiff is entitled to recover: 1st. The cost of repairs, \$89 79; 2d. The permanent and irreparable damages, proved to be at least \$100; 3d. The loss of trips, \$130.

He cited, 5 *Esp. Rep.* 43; 19 *Eng. C. L. Rep.* 298; 14 *Ibid* 445; 2 *Harr. Rep.* 481.

Frame, for defendants.—It is admitted that they must prove the negligence. But I contend that if the plaintiff was also to blame he cannot recover. If he recover it must be for the negligence of the defendants alone, and not their negligence combined with his own. The plaintiff was to blame 1st, for attempting to navigate the creek with a vessel entirely too large for the depth of water. The creek

is not a highway for the use of such vessels, but only for vessels suited to the navigation. No one has the right to block up the highway with a vehicle unfit for it, and such as will impede the passage of others in the free use of it. He would not even have a right to occupy the highway with a proper vehicle an unreasonable time. The principle on this subject is that every one has the right to use a navigable stream in the way in which it is navigable, and with only such vessels as are suited for the navigation. The schooner *Elizabeth* was unfit for this navigation, and the loading her down above this bend and whilst on the shoal was a misconduct by the plaintiff, which if it in *any degree* enters into the result and helps to produce the collision, will deprive the plaintiff of a right to recover. (5 Carr. & P. 175, 421; 6 *Ibid* 23; 9 *Ibid* 601.)

The putting such a vessel in this creek to block up the passage of others is an encroachment upon a public highway and is a nuisance, which any one may abate. (3 Bac. Ab. 686, tit. *Nuisance*, a.; *Russell on Crimes* 317-18-9, tit. *Highway and Nuisances*.)

A common carrier has no right to encumber himself with so great a load as to impede the passage of others. (*Russ.* 319-20.) So here the plaintiff had no right so to overload his schooner with freight, as to keep her aground in the middle of this creek, which is a public highway, so as to make it *less convenient* for others to pass and re-pass. And it is not enough that space was left by which others might possibly pass. For where a common carrier having a right to load and unload in a public street, took an unreasonable time in so occupying the highway, he was held guilty of a nuisance. (*Russ.* 319-20.)

It is no answer to say that a use of the public highway is *necessary* for the carrying on the party's business; it must be necessary for *public good*. (*Russ.* 320, &c.)

If then Mr. Cummins introduced into the navigation of this Duck Creek a vessel unfit for it, and which was a nuisance in it; or if he so loaded her down as to detain her aground in this highway an unreasonable time, he is in fault, he contributes to bring about the result of this collision; and without inquiring whether he or the defendants' vessel were *most* to blame he cannot recover. It produces a confusion of culpability; a mixture of causes; which a jury cannot divide and separate; and which they need not attempt to separate; for it is the plaintiff's own misconduct which produces the confusion. Just as if a man pour his own gold into another's crucible and mingle it with his he shall lose it all.

Bates, in reply.—The defendants were bound to provide a master for their vessel, who should not only do all in his power to prevent accident, but who should have competent knowledge and skill to determine what is the best course to pursue in every exigency. Nor will the existence of any the most remote culpability on the part of the plaintiff defeat his action, as has been contended. Even if the schooner was out of place, a vessel running into her would be liable in damages, if he could have avoided her by the use of ordinary care and skill. The concurrence of fault to deprive the plaintiff of his action must be a fault in immediate connexion with the injury. (33 Com. L. Rep. 252.)

The case then turns upon the question, whether this collision arose from the negligence of defendants' captain, and might have been avoided by the exercise of proper skill and caution. The plaintiff's vessel could not in any degree have contributed to it, for she was not in motion; she was where she had a right to be, and there was room on both sides of her to pass; abundant room on one side, of which the defendants' captain had notice, but he refused to pass on that side, and run into her by endeavoring to pass to windward; other vessels passed without difficulty.

The Chief Justice charged.—This is an action on the case, to recover a compensation in damages for an injury to the plaintiff's schooner, caused whilst lying in Duck Creek, in this county, by the defendants' sloop running foul of her.

The principal question is, to whose fault, negligence, or improper conduct, is the injury to be attributed?

The defendants' counsel contends, that if the plaintiff was in fault in any respect; that is, if his act, misconduct, or negligence, or that of the master of his schooner tended even indirectly or remotely, to produce the injury, the plaintiff is not entitled to recover; although the direct and immediate cause of the injury, was the negligence or want of proper skill or arrangement, on the part of the master of the defendants' vessel: That the plaintiff was so in fault; 1st. Because his schooner was unfit for the navigation of the creek, by reason of her draught of water; 2d. Because being so unfit, she was improperly loaded down; which in itself was unlawful; 3d. Because taking a vessel of her draught of water into that creek, was obstructing a public highway, and therefore a nuisance.

The Court do not assent to the doctrine of the defendants' counsel. As a general principle, it is admitted, that no person has a right to obstruct, to the prejudice of others, a navigable stream, by any kind

of vessel. But it appears by the testimony of some of the witnesses in this cause, that one or more vessels of the same draught of water with the plaintiff's schooner, and one of a greater draught, were in the habit of navigating Duck Creek; and of others, that she did not draw six inches more water than some, nor eighteen inches more than the rest; that she was of less beam than the vessel of the defendants; that when fully loaded with grain, she draws seven feet; that after she had commenced loading, she dropped down to Gaulk's Point, took in grain from a shallop; and grounded at an unusually low tide, where the usual depth of water at an ordinary tide is from seven and a half to eight and a half feet; that the injury occurred whilst she was thus aground; that she lay straight up and down the creek, at a distance from the New Castle shore, sufficient for three or four vessels to lie abreast, and at a distance from the Kent shore, sufficient for two vessels to lie abreast; that when the injury occurred, the tide was about two-thirds flood, and the wind fair for the defendants' vessel to have passed on the New Castle side; and that two vessels had passed without difficulty, at the first of the flood.

If these facts are sufficiently proved to the satisfaction of the jury, neither taking the plaintiff's schooner into the creek, nor loading her in the manner she was loaded, nor her occupying the place where she grounded, was an unlawful obstruction of the channel. Duck Creek is a common highway for all vessels whose draught of water permits them to navigate it. No law prohibits a vessel of the description of the plaintiff's, from proceeding up and down the creek for the purposes of trade; nor does her grounding at a low tide, and remaining until a high tide might enable her to get off, constitute a public nuisance. If it did, it follows as a legal consequence, that the owner or master would be liable to an indictment; and that any persons might lawfully abate the nuisance by removing the obstruction. This might not at all times be effected without injury or destruction to the cargo or vessel. If the doctrine urged by the defendants' counsel were correct, it would seriously affect not only the trading interests connected with the navigation of our creeks, but also the commercial interests connected with the navigation of large rivers. Ships of the largest class and tonnage, when deeply laden, have often grounded in ascending or descending the river Delaware; and in some degree, have thus obstructed its navigation. But who ever considered it an unlawful obstruction of the channel, or a public nuisance, when vessels, by the exercise of ordinary care

and skill, could readily pass on either side of the ship that was thus aground?

Therefore, the taking the plaintiff's schooner into Duck Creek, was no such fault or misconduct on the part of the plaintiff or the master, as excuses the defendants, if their vessel, by the negligence, want of competent skill or proper management on the part of her master, ran foul of the plaintiff's schooner. In cases of injuries of this kind, the fault of the plaintiff, in order to prevent his recovery, and to excuse the defendant, must be such as directly tended or contributed to produce the injury. If plaintiff's negligence, want of due care and skill, or his misconduct, is the immediate cause of the disaster, he must bear his own loss. But although there may be negligence on his part, yet unless he might, by the exercise of ordinary skill and care, have avoided the consequences of the defendants' negligence or misconduct, he is entitled to recover. If the disaster is caused by negligence, want of due diligence or of skill on both sides, both parties being equally to blame, neither can maintain an action in a court of law. If it arises from physical causes, beyond the control of the party inflicting the injury, and without fault in any one, the party injured must bear his own loss.

The gist of this action is the negligence, misconduct, or want of ordinary nautical skill or proper management on the part of the master of the defendants' vessel. This is a question of fact for the jury to determine, and the burden of proof lies on the plaintiff. Although the situation of the plaintiff's schooner might have exposed her to injury, yet if she was lying in such a position, that a person of ordinary nautical skill, using due care and diligence, could have avoided her, the master of the defendants' vessel is without excuse for running against her; and the defendants are responsible. If the injury was the result of accident happening from the winds, the waves, the state of the tide, or from other circumstance, which proper precaution, foresight, and competent skill could not guard against, the defendants are not liable.

If the jury find a verdict for the plaintiff, they ought to award him a fair compensation in damages, for the injury done to his schooner. In estimating them, the true measure is, the actual damage sustained by the plaintiff at the time and place of the injury. The expense of the repairs necessary and suitable to restore the schooner to her former condition, would be the proper amount of damages. But if she was deteriorated in value, by leaks caused immediately by the

injury, and which could not be remedied by the repairs, the plaintiff is entitled to a compensation for the impaired value of his vessel, as well as for the expense of such repairs as were actually necessary. But he is not entitled to recover any thing for the loss of the probable profits of two trips to New York, which with favorable weather, it is alleged, his vessel might have made during the winter.

Verdict for plaintiff, \$139 79.

Bates and Smithers, for plaintiff.

Frame, for defendants.



**JOHN W. JEFFERSON vs. CHARLES M. ADAMS, WM. ADAMS,
and others.**

Damages may be given by way of example or punishment, in an action of trespass assault and battery, though the defendant has been convicted and fined for the public offence.

This was an action of trespass quare clausum fregit, assault and battery, *et alia enormia* by Jefferson, against Adams and eight others.

The plaintiff proved a violent assault and battery, the entering of his house forcibly in the night time, beating him and driving him from the house; and he claimed exemplary damages.

Frame, for defendants, in opening to the jury, stated that the defendants had already been convicted on an indictment at this term, and punished by fine and very heavy costs, amounting to over \$700; and took the ground that in consequence of this, no damages could be given in a civil suit for the same offence by way of public example: but that they must be confined to such damages as would compensate the plaintiff for the injuries done him.

The defendants now offered to prove that the plaintiff's house was a low tavern, at which disorderly conduct was frequently allowed; with a view, as they stated, to the mitigation of damages: the evidence was objected to, and ruled out by the court.

The defendants' counsel then offered to put the defendants' characters in issue, which was objected to, and the evidence excluded by the court. (*Greenleaf's Ev.* 65, § 55.)

Houston, to the jury, argued that merely compensatory damages in such a case as this, would be ridiculous, and amount to no pro-

tection. The actual damage was almost nothing; a scratched face, and a torn coat; and yet, the plaintiff's house was forcibly entered in the night by eight or nine men; himself and his family abused and turned out of doors, and forced to fly for his life to the woods.

He cited 2 Stark. 813; 1 Com. L. Rep. 150; 2 Maule & Selw. 77; 14 Johns. Rep. 352; 8 Pick. 356; 3 Hill 180; 2 Leigh N. P. 1450-1; 15 Marsh. 493; 2 Stark. 897.

The defence impeached the principal witness on the part of the plaintiff, and supposed the case to be that Wm. Adams, having been admitted into the plaintiff's house, which was a tavern, got into a fight with plaintiff, and the others broke in to rescue him.

The plaintiff's counsel denied that there was any sufficient evidence of this, and called witnesses in support of the witness whose character had been impeached.

They also asked the court to charge, in relation to the law; 1. That though these defendants may have entered legally and peaceably, yet if they afterwards committed any trespass, they became trespassers from the beginning. 2. That though there may have been one principal trespasser, all persons who were present, aiding, assisting, abetting or consenting, were equally guilty. 3. That if the jury believed a trespass had been committed, they must take all the circumstances of aggravation into consideration in the assessment of damages. 4. That the jury were not confined to any pecuniary loss the plaintiff may have sustained, but might give exemplary damages according to the aggravation of the trespass. 5. That as the damages could not be apportioned, the jury might assess damages according to the conduct of the most culpable.

Booth, *Chief Justice*, charged the jury.—The case has been unreasonably protracted by the introduction into it, especially into the argument, of matters having no relation to the issue joined. All these matters are to be discarded from your consideration, which must be confined to the issue, whether the defendants committed a trespass by breaking and entering plaintiff's house, and if they did, what are the damages? This is the general issue on the plea of not guilty. There is a plea of justification, but it has not been sustained by any evidence, nor relied on in the argument. The plaintiff kept a public tavern, and persons presenting themselves in a proper manner had the right to enter such a place; but they have no right to enter by violence or for the purpose of breaking the peace; or, having entered lawfully, if they are afterwards guilty of unlawful conduct, this makes them trespassers from the beginning.

The question then for the jury is, whether from credible testimony given by witnesses in the cause, the jury are satisfied that these defendants entered the plaintiff's house unlawfully, and in reference to the violence which would inculpate all of the defendants, the rule is, that any one present, aiding and abetting, or giving active countenance to others committing a breach of the peace or a trespass, is also guilty of a breach of the peace or trespass.

It was not denied that in actions of trespass for *wilful injuries* the jury might, if they thought the case required it, give damages by way of punishment, and beyond a mere compensation of the actual injury. It was for the jury to say whether there were circumstances of aggravation in this case, which ought in their judgment, to require a departure from the general rule of compensatory damages; and which called on them to add any thing by way of public example or punishment. As to the proceedings in the criminal court, they were not evidence, and could not have been given in evidence in this case, and were not to enter into the consideration of the jury in deciding it either as to the propriety of a verdict against the defendants, or for the amount of the damages. The indictment was between other parties; the State and these defendants, and not this plaintiff and the defendants; the verdict was rendered upon other testimony than that given in this case; even upon the testimony of the plaintiff himself and his wife; and the punishment, if any such has been inflicted, had reference to the public peace and not to this plaintiff's wrongs. It would obviously, therefore, be improper that these proceedings in the criminal court should enter into the present case for any purpose.

Verdict for plaintiff, \$50.

Layton, Houston and Smithers, for plaintiff.

Bates and Frame, for defendants.



JACOB PRICKETT, d. b. vs. ABNER HERRING, p. b.

The rule of court requiring a plaintiff in certiorari, to file exceptions or alledge diminution by the first Friday of the term, does not extend to the defendant.

KENT, October term, 1845. This was a certiorari directed to Justice Walston, who returned the record at the term, and the plain-

tiff in error filed exceptions in due time. When the case was called for hearing,

Mr. Bates, for the plaintiff below, asked to alledge diminution of the record; and the question arose whether the rule No. 36, which requires the plaintiff in a certiorari to file exceptions or alledge diminution by the first Friday of the term, should apply also to the defendant; and the court thought it would not be reasonable to require the party who supports the judgment to use the same diligence, for he necessarily awaits the proceeding of the other party.

Leave given to alledge diminution and continued.

Bates, for plaintiff.

Smithers, for defendant.

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MERRITT SCOTTEN, d. b. appl't *vs.* JOSHUA BROWN, p. b. resp't.

A parol contract relating to lands, is void by the statute of frauds, and cannot be proved for any purpose, either of claim or defence.

KENT, October term, 1845. This was an appeal from the judgment of a Justice of the Peace, in an action of assumpsit for work and labor. The pro narr. contained the common counts for work and labor, and a special count on a contract, that in consideration that defendant would clear and grub a piece of new ground, plaintiff would pay what it was reasonably worth.

The plaintiff proved a clearing of a certain meadow for defendant; and that it was worth \$30 to clear it.

The defence was, that Brown was the tenant of defendant on a farm for five years, and that he cleared this meadow which was not a part of the farm, for his own benefit, without any agreement on the part of defendant to pay him any thing. After the meadow was cleared the defendant agreed that he should have the meadow for three years as a compensation for clearing it; he seeding it. The defendant offered a witness to prove this, and the evidence was objected to on the ground that such a contract if proved was void, by the statute of frauds, being a parol contract concerning lands. (*Dig. 88; 2 Stark. Evid. 347.*) It respects an interest in the soil; and not merely in the crops at maturity; which is the distinction between cases in, and those out of the statute. (*7 Johns. Rep. 205; 11 Mass. Rep. 533; 9 Johns. Rep.*)

Mr. Frame said, the statute of frauds only prohibited the bringing suits upon such contracts, and did not make it void under all circumstances.

The Court:

Booth, Chief Justice.—The statute of frauds introduces no new principle, but a new rule of evidence, requiring that contracts relating to lands shall be evidenced by writing and not otherwise. This rule is to prevent perjury, by avoiding the danger and removing the inducements to false swearing in relation to contracts relating to lands. The danger in this respect, and the necessity of the rule which the statute prescribes, are equally strong, whether the suit is directly upon the contract, or the contract is sought to be proved incidentally and by way of defence. The only question then is, whether this contract is for or concerning *such* an interest in lands as is within the statute? and being of the opinion that it is, we rule out any parol evidence of such a contract.

This ended the case, and the plaintiff below had a verdict.

Bates and Bates, jr., for plaintiff.

Frame, for defendant.



WOLF *vs.* HEATHERS.

General rule as to notice of inquisition or sale of land.

KENT, October term, 1845. In this case an inquisition on lands having been set aside for want of proper notice to the defendant, the court made the following general rule:

No. 45. Notice of holding inquisitions on land, or of sale, shall be served personally on the defendant if residing in the county. If he does not reside in the county, notice shall be served on the tenant, or if there be no tenant, shall be left at the mansion house or other notorious place on the premises.

A. P. SHANNON, garnishee of J. HAMILTON *vs.* JOHN ALLEN.

On execution attachment, from a Justice of the Peace, judgment cannot be rendered against the garnishee before the return day of the execution.

NEW CASTLE, November term, 1845. Certiorari to Justice Egbert, who returned the record of a judgment at the suit of Allen against Hamilton, dated January 12, 1843, for \$38, and an execution attachment issued January 13, 1843, returnable February 22, 1843, but requiring the garnishees to appear and answer on the 1st of February. The constable returned this execution with an endorsement that he had summoned Abraham P. Shannon as garnishee. The garnishee appeared Feb. 18, 1843, and answered on oath "that he has \$28 in his hands," therefore judgment against him for that sum.

The exceptions were: 1st. That the garnishee was summoned to appear on a day prior to the return of the execution; 2d. Because it does not appear but that the judgment against Hamilton was levied on the execution and satisfied without the garnishment; 3d. Because it does not appear that the clause for summoning garnishees was added to the execution *at the request* of the plaintiff in the execution; 4th. Because the answer of the garnishee was taken on a day after the return day of the writ.

Gray.—The judgment of the justice of the peace ought to be such as to afford a protection to the garnishee. This cannot be unless the garnishment is in due form: 1st. The clause of garnishment cannot be lawfully added without the request of the plaintiff; 2d. It *must* be made returnable on the same day with the return day of the execution: and this is important, for the justice cannot know on any day before the return, whether the execution has not been levied otherwise.

Rodney.—The court will imply that the clause of garnishment was added on the request of the plaintiff. There are some presumptions that must always be made. 2d. It is not for the garnishee to object to the return day of the attachment after appearing and answering on that day.

The Court.—The second exception in this case is fatal, a judgment cannot be rendered against a garnishee, nor his answer taken, on a day prior to the return day of the execution, nor subsequent, unless by adjournment or postponement for that purpose.

Judgment reversed.

Gray, for plaintiff.

Rodney, for defendant.

MARY DRUMMOND *vs.* SAMUEL HOPPER.

Replevin lies only for a *tortious* taking.

Possession is evidence of property.

Replevin will not lie by the owner of property against the purchaser from a bailee, though he had no authority to sell; for the taking is not *tortious*.

But a contract with such a bailee when drunk, whether made so for the purpose or not, is void and gives no right to the possession; and a taking under color of such contract may be regarded as tortious.

THIS was an action of replevin tried at the November term, 1845, for a horse. The pleas were non *cepit*; property in the defendant, and property in a stranger. The horse was replevied (after a demand and refusal) and delivered to the plaintiff, who counted in the *detinuit*.

The evidence on the subject of the property as well as the possession of the horse and the manner of his coming into defendant's possession, was conflicting on the part of the plaintiff; it was proved by her son, Wesley Drummond, that the horse was her's and was exchanged by him with the defendant without authority and when intoxicated, having been induced to drink by the defendant for the purpose of getting him into this trade.

On the part of the defendant it was proved that the son used the horse as his own; offered to exchange with others; and did exchange with defendant and deliver the horse to defendant when sober.

This was relied on as conclusive for the defendant on the plea of non *cepit*; submitting to the jury the question of property.

Mr. Rogers.—Replevin will not lie except in cases of tortious taking; for although in *trover* a demand and refusal are evidence of a conversion, it will not make an unlawful taking. The propriety of the exchange between Wesley Drummond and the defendant, has nothing to do with this question. In no case where a party comes into possession of goods under a contract of purchase from a person in possession, can the action of replevin be maintained by a third person claiming the goods, though *trover* might.

Mr. Wolfe and *Mr. Wales.*—Any such purchase by fraudulent practices can give no right of possession to the purchaser. The contract itself is void and the taking the horse from a bailee of the owner, under the color of such a contract, is an unlawful taking from the possession of the owner; for the possession of the son, by her permission, for a temporary purpose, is the possession of the mother.

BoOTH, *Chief Justice*, charged the jury.—The action of replevin lies in cases only where the property has been taken tortiously or unlawfully from the possession of the plaintiff. The declaration charges an unlawful taking.

The defendant pleads, 1. That he did not take the property in manner and form as the plaintiff alledges; 2. That the property was in himself; 3. That it was in some third person.

If the defendant has maintained any one of these defences he is entitled to the verdict of the jury.

The question is, to whom did the horse belong? If it belonged to Wesley Drummond, the plaintiff cannot recover.

The first evidence of personal property is possession. If this young man was in the possession of the horse; holding himself out to others as the owner; and acting as the owner; the presumption of law is, that he was the owner. If he traded away this horse with the defendant in exchange for another, and delivered it to the defendant, (although he got the worst of the bargain) there being no fraud practiced by the defendant, the taking was not tortious, and in such case this action will not lie, but the plaintiff's remedy would be in another form of action. If, however, the plaintiff was the actual owner of the horse, and her son unlawfully took the horse from her possession, the unlawful taking continues in every place where the property is detained.

If Wesley Drummond was the bailee of his mother, that is, if the horse was lent to him, or delivered to him for any special purpose, and he delivered the horse to the defendant under contract, the defendant's taking is not unlawful and this action will not lie. If it appears to the jury that this young man was made drunk by the defendant, or if he was in a state of intoxication, whether by the means or procurement of the defendant or not, and thus rendered incapable of the exercise of reason, and while in such condition the alledged contract was obtained by the defendant, the contract was fraudulent and void, and would give no right of possession of the horse.

A possession thus acquired under such pretended contract, which in itself, would be illegal and void, could in no manner protect the defendant in this action, if it appears that Mary Drummond was the unequivocal owner of the horse. We are inclined to the opinion that a possession thus acquired would be an unlawful taking, and would entitle the plaintiff to recover in this form of action. And we believe this to be an extension of the common law doctrine, for it is a settled

principle in the English courts, that to sustain the action of replevin the plaintiff must make out a case of unequivocal possession in himself and of a taking by the defendant.

The plaintiff had a verdict.

Wales and Wolfe, for plaintiff.
Rogers, for defendant.



J. G. ROWLAND, surviving partner of ROWLAND & STOCKLEY
vs. HENRY BENNETT'S Adm'r.

In a case standing referred, the court refused to make new parties, by suggestion of plaintiff's death, and on motion merely; several terms having elapsed.

AMICABLE action. March 24, 1831, by consent of parties, and order of court, referred to Jacob Faris, George Platt and Nathan Boulden.

At the November term, 1845, *Mr. Wales*, for plaintiff, made a suggestion of the death of Joseph G. Rowland, which took place in 1839, and moved that his executors be admitted party to the record. (*Const. Art. 6, Sec. 18.*)

The Court.—In the case now presented there has been a lapse of fourteen years, without any thing done in the premises, and we think it would be a bad precedent to make a party now on a suggestion of the death, and authorize a continuance of the old suit. The practice has uniformly been in cases *pending*, to suggest the death *at the next term* and not after; and there is no reason to depart in this case from the usual practice. It might well be otherwise if there had been an award made in this case and confirmed, that is, if the matter had passed into judgment.

Motion refused.

Wales, for plaintiff.

GEORGE HOUSTON and wife *vs.* JAMES JAMISON'S Adm'r.

Interest may be recovered on arrears of an annuity given in lieu of dower, though there be a power of distress.

This was an action of debt on a deed securing an annuity to Mrs. Houston in lieu of dower, to recover the arrears, and interest. The deed contained a clause of distress.

The question was whether the plaintiff could recover interest on the arrears of an annuity which was granted in lieu of dower, and *Beeson's Ex'r., vs. Beeson's Adm'r.* 1 Harr. Rep. 106, and *Waples vs. Waples*, *Ibid* 392, (n.) were cited.

Mr. Gray submitted that although interest might be recovered in the cases cited, where the party had no right of distress, he should not recover interest where he had that remedy; in analogy to the decisions which have been made refusing interest in the action of replevin on a distress for rent arrear.

But the *Court* said, the only reason why the general principle allowing interest as it is adopted in this country, had not been applied to the case referred to, was from the peculiar language of the act of assembly. (*Dig.* 364.)

Verdict for arrears and interest.

W. H. Rogers, for plaintiff.

Gray, for defendant.



PATRICK HIGGINS *vs.* PAUL BOGAN.

Judgment will not be arrested *after verdict*, for any defect in pleading, which would not have been fatal on *general demurrer*; nor then, if the court can presume the defect to have been supplied by proof before the jury.

An instrument must be declared on according to its legal effect, whatever its form. A promissory note with a seal to it is a bill obligatory, and should be declared on as such.

Proof by the subscribing witness that he saw the party deliver an instrument already signed and sealed by him, is sufficient.

This was an action on a note under seal, dated November 15, 1843, by which defendant promised to pay plaintiff \$100, five months after date, without defalcation, for value received. Pleas, non est factum and payment; replication and issues.

The attesting witness was called to prove the note; and testified that he did not see Paul Bogan write his name. He handed the paper to Higgins and Higgins to witness, and asked him in the presence of Bogan to sign it as a witness. He saw Bogan writing; but did not know that he was writing on this paper.

The evidence of the note was objected to by *Mr. Rogers*; 1. Because its execution was not proved; 2. For variance from the declaration.

The declaration counted; for that whereas the said Paul Bogan, heretofore, to wit, on the 15th day of Nov. A. D. 1843, in the said county of New Castle, by his certain promissory note in writing, sealed with his seal, promised to pay to the said Patrick Higgins, or order, the said sum of one hundred dollars above demanded, to be paid to the said Patrick Higgins, five months after the date of the said note, which period has now elapsed: yet the said Paul Bogan (although often requested so to do) hath not yet paid the said sum of \$100, above demanded, or any part thereof, to the said Patrick Higgins, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. Wherefore, the said Patrick Higgins saith he is injured and hath sustained damage to the amount of twenty dollars; and therefore, he brings his suit, &c.; and the said Patrick Higgins brings here into court the said promissory note in writing, sealed as aforesaid, which gives sufficient evidence to the said court here, of the debt aforesaid, in form aforesaid; the date whereof is the day and year in that behalf above mentioned.

Court.—This paper is drawn up as a promissory note, but being sealed it is a bill obligatory, and should have been declared on as such, as the pleader is bound to state any paper in pleading according to its legal effect. The pleader here has undertaken to follow the terms of the paper, which unite the promissory note with a single bill, by declaring both in debt and case. We will look at the recent precedents; and for that purpose you may go on to the jury, and we will take the verdict subject, if for plaintiff. The plaintiff to have a nonsuit if we hereafter set aside his verdict.

A deed or other instrument, under seal, to which there is a subscribing witness, must be proved by such witness, if he can be produced or is capable of being examined. It is not absolutely necessary that the witness should see the party sign or seal the instrument. If he sees the party deliver the instrument already signed and sealed as his deed, it is sufficient.

The material ingredient in the execution of sealed instruments, is

the delivery; but no particular form or ceremony is necessary. If the party who signs and seals the instrument, testifies in any manner, by word or action, his intention to deliver it or put it in the possession of the other party, it is sufficient.

Note admitted; and plaintiff closed.

The jury rendered as their verdict, "that they find for the plaintiff; and that there is \$109 67, due, &c., with six cents costs, besides the costs expended; subject, &c."

At a subsequent day the court, considering that the variance between the note offered and the declaration did not vitiate the verdict, ordered it to stand absolute. Whereupon a motion was made in arrest of judgment; 1st. For a material variance between the declaration and the verdict; 2d. Because a verdict and judgment in debt cannot follow a declaration sounding in damages, and which is not for a sum certain; 3d. Because the verdict was inconsistent with the plaintiff's complaint as stated in his narr.

After argument, motion in arrest of judgment refused, and judgment for plaintiff on the verdict. (See *Gould's Plead.* 496, §§ 11, 12.)

It is an invariable rule, that no defect in the pleadings which would not have been fatal to them on general demurrer, can ever be a sufficient cause for arresting judgment; nor is it by any means true, that every defect in the pleadings which would have been fatal on general demurrer, is sufficient ground for arresting judgment after a general verdict.

Wales, for plaintiff.

Rogers, for defendant.



JOHN RICE VS. ADAMS, BETTS & HODGSON.

Real fixtures, such as steam engines, &c., placed on the premises by the owner, and attached to the freehold, as a fixed establishment, are a part of the freehold, subject to real estate liens, and not liable to be seized as chattels.

Not so of trade fixtures set up by tenants for their own use and convenience.

F₁. F_A., levy and sale made, among other things, of a steam engine, boilers, cranes, cupola and fan, connected with the establishment of defendants for manufacturing steam engines, machinery and other manufactures in iron and brass, &c.

Mr. Gray, of counsel for Orrick & Campbell, *judgment* creditors of Adams, Betts & Hodgson, moved to set aside the levy and sale of the machinery connected with the defendants' manufactory, on the ground that the same was a part of the *real estate* of defendants; and not personal property. The sale was made under an agreement to submit this question to the decision of the Superior Court, and public notice of this was given at the sale, and that the machinery should not be severed or removed, nor possession delivered to the purchaser, until it should be determined that the said property was personal property, liable to be levied on and sold under the said f. fa. Rule to show cause.

James C. Adams, one of the defendants, was the owner of a lot of ground in Wilmington, upon which, prior to the 1st of January, 1845, he had erected a foundry, including a steam engine, boilers, cranes, cupola, &c., all fixed to the premises in the usual way. The steam engine was put up under a shed building outside the body of the main building, but connected with it, and passing into it; the boilers, cupola, &c., were in the main building; the cranes bedded in the floor, and inserted in a main girder of the house. The cupola, was a large brick chimney, running from the ground floor up through the roof of the building. A schedule of these, and other articles amounting to \$7,593 10, was made under the hand of James C. Adams, but without date, purporting to be an inventory of property sold by James C. Adams, to the firm of Adams, Betts & Hodgson. It had an endorsement made by Adams, as was alledged *after* the entry of the judgment of Orrick & Campbell, in these words:

"The within described property was sold by me on the first day of January, 1845, to the firm of Adams, Betts & Hodgson, at the appraisement within made, they occupying my lot in Wilmington, where the foundry stands, by my permission and agreement, and being bound to pay me a reasonable compensation therefor on settlement." The judgment of Orrick & Campbell was dated 9th April, 1845; the judgment of Mr. Rice bore date 13th August, 1845, and was confessed on bond given 7th August, 1845.

Mr. Gray, contended that the engine, boilers, &c., were a part of the real estate of James C. Adams, at the time of the entry of this judgment, and continued so after the endorsement of this schedule; and that these fixtures were not liable to seizure under the execution of Mr. Rice.

The law is well settled that fixtures are a part of the realty, and pass by a deed of the realty, without specification. No act has been

done by Adams to change the character of this property. There was no actual severance of them from the freehold. Even if he had sold these fixtures, they could, without severance, pass only by such a conveyance as would pass real estate. This schedule and endorsement, if made in good faith, were not sufficient to pass the title to these fixtures.

The law of fixtures is subject to some modifications, as between landlord and tenant, in favor of trade; but none coming up to the present case. (*3 East 38, Elwes vs. Mayo.*) A tenant of a farm cannot remove outhouses erected by him at his own expense, and for his convenience during his term.

In Pennsylvania, it is decided that such fixtures are a part of the real estate, if erected by the landlord; otherwise, if erected by the tenant for the purpose of carrying on his trade. (*3 Watt's Rep. 140; 4 Watt's Rep. 330; 17 Serg. & Rawle 415; 7 Watt's Rep. 106; 2 Watts & Serg. 390, 116.*)

Mr. Wales, for John Rice, the execution creditor of Adams, Betts & Hodgson.—This is not a question between the heir and personal representative of the owner of this property. It arises between Orrick & Campbell, who have no interest in the real estate of the defendants, but merely a lien upon it, and the execution creditors who have levied on this property as the personal property of the defendants.

The first question then is, what right has the judgment creditor as such, to interfere with the levy of the execution creditor. Mr. Adams being the owner of the premises, as well as the fixtures, sold the fixtures to the defendants to be used by them on the premises, for the purposes of manufacturing. Is their right to these fixtures to be taken away from them by the subsequent entry of the judgment of Orrick & Campbell?

The next question is, whether these are real fixtures, or only temporary fixtures for trade and manufacture? The general principle on this subject is, that for the benefit of trade, such articles as these are to be regarded as distinct from the freehold, and subject to removal by the tradesman or manufacturer. Buildings, &c., erected for agricultural purposes are often held as connected with and belonging to the freehold, where fixtures of trade would be held otherwise. (*3 East Rep. 38; 13 Law Lib. 16, 54, 22.*)

Another question is, whether the sale and transfer under the schedule to defendants, before the judgment of Orrick & Campbell, did not effect a severance of these fixtures? Adams, at that time,

had the perfect right to sell these articles, and sever them as he pleased. The owner of a farm might sell the wood-leave, and a subsequent judgment lien would not affect it, much less will it prevent a purchaser of such fixtures from removing them. After the purchase by Adams, Betts & Hodgson, these fixtures are to be regarded as the tenant's, set up for the use of their trade, and subject to removal at the exigencies of trade, or the will of the tenant. (18 *Law Lib.* 7, 8, 27-8.)

Mr. Gray, in reply.—The cases I have cited, show that these articles were on the 1st of January, 1845, a part of the real estate, and of the freehold. The facility of their removal is not the test of their character; but being erected by the owner of the realty, and forming a part of the realty, they continue to partake of that character, unless actually severed and taken away.

The only relaxation of this rule is in favor of tenants and tradesmen, who put up such machinery for the exercise of their own trade: every case of exception referred to is of that kind. But this is no such case. The defendants are not tenants of Mr. Adams, they did not erect these fixtures. The fixtures were placed there by the owner of the land, and were a part of the realty both on the 1st of January, and the 9th of April. Nothing has been done to sever these fixtures from the realty in fact; and the schedule made by Mr. Adams, even if made on the 1st of January, or a sale, or renting by Adams, would not change the character of the fixtures if they be a part of the realty, without such a conveyance as relates to the realty.

As to the right of Orrick & Campbell, to object to the levy in this form, it is by express agreement with other counsel of Mr. Rice, and to prevent a resort to chancery. We would have the right however, to apply to this court to stop the waste by removing these engines, &c.

By the Court:

HARRINGTON, Judge.—The property levied on by this execution, so far as the present motion appears, consists of real fixtures placed upon the premises by the owner of the property, and by him attached to the freehold. They became by his act a part of the foundry, not for a temporary purpose, but as a fixed establishment; and, as such, were used by the defendants in copartnership, the owner of the premises being one of the partners. Having thus acquired the character of real property by such a union and connection with the realty as unquestionably made them, in his hands, a part of the freehold, subject to real estate liens, and not liable to be seized as chat-

tels, this character could not be changed otherwise than by actual severance; nor could they be transferred before severance except as a part of the realty, and by forms of conveyance suited to real property. The parol sale, therefore, to Adams, Betts & Hodgson, evidenced by the written memorandum without date, even if made before the entry of Orrick & Campbell's judgment, would not prevent the lien of that judgment, nor subject these fixtures to seizure on plaintiff's execution as the personal chattels of the defendants in preference to the judgment of Orrick & Campbell. We are, therefore, of opinion that the rule in this case should be made absolute; and we do not consider this as in any degree conflicting with adjudged cases in relation to trade fixtures set up by tenants, for their own use and convenience, to facilitate the carrying on their business.

Wales, for plaintiff.

Gray, for Orrick & Campbell.



**WM. SHARPLEY, and JANE, his wife *vs.* CHARLES TOWNSEND,
Executor of ROBERT FORWOOD, deceased.**

A devise of land to executors to sell for payment of debts, is a conversion of it "out and out;" and the proceeds are applicable to pecuniary legacies.

CASE stated. The case agreed set out, that Robert Forwood, being seized in fee of certain real estate, duly made and published his last will and testament, by which he devised as follows:

"Imprimis, it is my mind and will that all my just debts and funeral expenses be paid in a reasonable time after my decease, out of my personal property and sales of lands hereinafter mentioned by my executors hereinafter named." The testator then devised different portions of his real estate to different persons, and bequeathed several specific and pecuniary legacies; and, among others, a legacy of fifteen hundred dollars to Jane Sharpley, wife of plaintiff; and concluded the disposition of his property with the following: "It is my mind and will that my executors shall sell my marsh in Cherry Island, together with my Marshal lot of land, and the farm which I lately bought at public sale, for the best price they can get, and make and execute a good and sufficient title for the same as I could were I personally present, within one year after my decease."

The question proposed for the consideration of the court was

whether the proceeds of sale of the land thus directed to be sold, become part of the personal estate of the testator, and as such subject to the payment of pecuniary legacies; or whether there was a resulting trust of the balance, after the payment of debts and funeral expenses, in favor of the heirs at law of the testator?

By the Court.—The general principle is, that money directed to be laid out in land, is treated as land; and land directed to be sold, is money or personality. (*5 Law Lib.* 4; *Leigh & Dalzell* 4; *1 Bro. Ch. C.* 497; *Fletcher vs. Ashburner*; *Amb.* 581, *Wainwright vs. Benlows.*)

If there be a general conversion, the kind of property is entirely changed; but if only for certain purposes, there is a resulting interest for the heir at law. (*5 Law Lib.*; *Leigh & Dal.* 119; *3 P. Wms.* 21, n.; *Mallabar vs. Mallabar.*)

If there be no direction as to the object of the conversion, and the land is directed to be sold, it is a change out and out of the realty into personality. (*Amler* 583; *5 Law Lib.* 130; *Cook vs. Duckenfield*, *2 Atk.* 562.)

The direction in this will is general, to the executors to sell the land without special object, unless as connected with the previous clause, which directs the payment of debts out of the personal property, and sale of the land. The land is not directed to be sold for that purpose, but only that the debts shall be paid out of the personality as enlarged by the sale of the land. The first clause blends the personal property and proceeds of sale of land together; and directs payment of debts and funeral expenses out of the fund. It is not the principal provision; but is ancillary. The last clause is the principal and independent clause, the purpose of which was to augment the personality.

JUDGMENT.—And now to wit, this first day of December, A. D., 1845, the *Court* being of opinion that it was the intention of the testator to convert the real estate ordered to be sold by his executor, absolutely into personal property, and as such, subject it to the payment of pecuniary legacies. It is ordered that judgment be entered in favor of the plaintiffs; the amount to be ascertained by the register of wills, upon a settlement of the account of the defendant's executor.

R. H. Bayard, for plaintiff.

Gilpin, for the executor.

ERASMUS D. WOLFE, surviving partner of WILLIAM M'GLENSEY
vs. ROBERT W. GARDNER and JAMES S. WHITE.

A release by a judgment creditor, at the instance of the debtor, of one of several tracts of land bound by the judgment, will not operate as a release of the others.

Pl. fa. d. s. b. to November term, 1845, levied on lands of Robert W. Gardner. Rule to show cause why the execution should not be set aside on the following case stated: 1. The judgment upon which this writ issued was entered on the 7th of January, 1843, in the Superior Court. 2. On the 16th of May, 1835, Robert W. Gardner took the benefit of the insolvent laws of this State, and made an assignment of all his property to Erasmus D. Wolfe and James Gardner, trustees appointed by the court. 3. At the time of the assignment the said Robert W. Gardner was seized in fee of an undivided fifth of four tracts of land, subject to the life estate of his father, the said James Gardner. 4. On the 25th of March, 1840, James Gardner, together with the said Robert W. Gardner, and the owners of the other four fifths of said lands, conveyed *one* of the said tracts, viz., No. 4, to William F. O'Daniel; and at the same time, and as a part of the same transaction, Erasmus D. Wolfe and James Gardner, assignees and trustees under the insolvent assignment aforesaid, conveyed the interest of the said Robert W. Gardner, in said tract of land No. 4, to said O'Daniel; and at the same time Erasmus D. Wolfe, surviving plaintiff in said judgment, at the instance of said Robert W. Gardner, executed to the said O'Daniel, a release of the said property so conveyed to him from the lien of the said judgment.

The question was, whether the plaintiff by his release of No. 4, released the lien of the judgment on Nos. 1, 2, and 3.

Whitely.—A release is to be taken most strongly against the releasor. E. D. Wolfe having a lien on all the real estate of R. W. Gardner, could not by his own act vary the extent of this lien, without affecting the whole lien. The judgment here was an entirety; the claim *one*; the lien *one*. An entire thing cannot be released as to part. A release of an execution as to one of twenty acres is a release of the other nineteen. (5 Bac. Ab. 713; 8 Ibid 292, *Bouvier's Ed.*, title *Release L.*)

The debt due by a judgment is no other than a personal debt, though the land be a means of payment: a release to the debtor of

any part of the land bound, is a release to the debtor of a part of an entire sum due, which cannot be.

Defendant's land is not liable to sale until it appears, by inquisition, that *all* the land bound by the judgment would not be sufficient to pay the debt in seven years; by this release a sale may be had upon condemnation of only a portion of the land originally bound by the judgment.

It is a well settled principle, that the release of one of several co-obligors is a release of all; and there is a strong analogy between such a case as that, and the release of one of several tracts bound by a judgment. Such a release would afford great facilities for fraud in reference to other creditors; as where a mortgage creditor has a lien upon one tract, and a prior judgment creditor a lien on that *and others*, releasing the tracts not mortgaged throws the whole of the judgment as well as mortgage on the mortgaged property, and may prejudice such creditor. A release of part of land bound by a rent charge is a release of the whole; and the analogy between that case and this is strong. (*4 Bac. Ab.* 291; *6 Com. Dig., Release E.* 194; *Cro. Eliz.* 40, *Hyde vs. Morley.*)

Bayard.—This is a legal question; no equitable considerations connected with it. It is the case of a defendant having got his creditor to release a judgment lien on one of four tracts of land, to enable him to sell that tract advantageously, now claiming that this release, made at his instance, and for his benefit, shall have the effect to release all the rest of his property.

The authorities referred to need explanation. The release of one of twenty acres under execution is a release of all. This has reference to the English execution by elegit, which puts the creditor into possession of the land, *ut liberum tenementum*; he holds it as an entirety, and cannot release a part. So of a rent charge not apportionable, no part can be released without the whole. But how does this apply to the case of a judgment, or execution? The plaintiff is not bound to go against all the defendant's property. He may select any portion; and it is often essential to the defendant, that his creditor shall have this power.

A release of a part of an undivided portion of things pawned is only a release pro tanto. (*Story Com.* 244, § 364.) The judgment lien is not an estate in the land. It is but a general right to take in execution the land of the debtor, and the creditor may, in his case, release a portion of the land. In England, after acquired property

is encumbered by a judgment lien. In Pennsylvania, it is subject sub modo ; if not alienated by the defendant.

There is no analogy between this and the case of joint debtors. There the debt is all due from both, and a release of one is a release of both. But here is no interest or estate in the land, nor is the land the debtor ; the debt is due from the defendant, and the land but a means of payment. The remedy is not released. The remedy is the judgment and execution ; no part of that is released ; nor is the debtor released in respect of any part of the debt. If all the land were released, the party would still have his execution against the goods.

Gilpin.—In Pennsylvania, they release part of land mortgaged ; which is the strongest case of release ; for a mortgage by the English notion vests an estate in the mortgagee.

Mr. Rodney ; ut amicus curiae. It has often been done here ; the mortgage being nothing more than a personal security for the payment of money, though it does create a specific lien.

The Chief Justice said it was a very old practice to release part of land bound by judgment, at the instance, and for the relief of the debtor ; and it had never been supposed that he could object to it ; whether any other person who might be injured by it could or not. He mentioned precedents of such release drawn by the elder Mr. Read and Mr. Vandyke.

HARRINGTON, Judge.—This is not technically a release. It amounts to nothing more than a covenant by the judgment creditor of Gardner and White, made with a third person, O'Daniel, not to levy the judgment out of a portion of Gardner's property which O'Daniel had purchased. This was for the benefit of the debtor, and done at his request. The agreement of the creditor to waive his remedy as against one of four tracts of land bound by the judgment, and to rely exclusively on the security of the other three, might benefit, but could not injure the debtor ; and if it could in any way affect the rights of others, the objection should come from them. If the lien of the judgment should be thus thrown upon a part only of the property to the prejudice of other liens, a case might be presented for equitable relief on the principle of marshalling securities ; but here, in a court of law, without any allegation of fraud, or indeed of any injury to the rights of the defendant, or of any one else, I do not think he has any substantial ground for his motion to set aside this execution. I am, therefore, for discharging the rule.

The other judges concurred.

Rule discharged.

R. H. Bayard and *Gilpin*, for plaintiff.

Whitely, for defendants.

BENJAMIN TILGHMAN *vs.* WILLIAM CRUSON.

The purchaser of timber trees, at a collector's sale for taxes, is not bound to see that the proceedings are all regular.

It is enough if the sale is legally authorized; its regularity cannot be collaterally questioned.

Trespass being a wrong to the possession, a landlord cannot maintain this action for an entry on lands occupied by a tenant.

NEW CASTLE, November term, 1845. This was an action of trespass quare clausum fregit, for entering plaintiff's close, and cutting trees, &c. &c. The pleas were not guilty, and justification under the authority and direction of Auley Lore, who purchased thirty timber trees on the premises, at a collector's sale of said trees, made by Thomas Scott, collector of taxes for Appoquinimink hundred, to pay a balance of public taxes due from plaintiff; replication and issues.

Mr. Whitley, for plaintiff, contended that the defendant was not justified in taking these trees, under the collector's sale to Lore; and by the command of Lore; because the collector did not give lawful notice of the sale.

Mr. Rodney, replied, that in this collateral proceeding, the regularity of the collector's sale could not be inquired into; nor could a purchase of timber at such sale, be made liable as a trespasser, for any irregularity in the collector's proceedings.

Booth, Chief Justice.—In the action of trespass the plaintiff must show that he was in possession when the trespass was committed; and if the land is under lease to a tenant, the landlord cannot maintain trespass for entering and cutting trees; for this is an injury to the tenant's possession; and he must bring trespass, though the landlord might have another remedy. But if the lease reserves the timber land, the landlord being in possession may maintain this action.

The principal question is under the plea of justification by authority of a purchaser of the trees at the collector's sale, for payment of taxes. The law for the collection of taxes, *Dig.* 379, &c., authorizes a collector to levy and make the taxes from the tenant, or occupier of the premises, or in case such collector shall not be able to find goods or chattels of the tenant, or to collect the same from the tenant or occupier, to levy upon and sell so much of the timber or grass growing on the premises, as will be sufficient to satisfy the taxes and costs. The primary duty of the collector is

to levy the taxes out of such goods of the tenant as he may find; but if he find none, he is to proceed to sell the timber or grass growing, after giving notice in five or more of the most public and convenient places, having reference to the object of procuring a good sale, which would be effected rather by posting notices in the neighborhood, than at a distance. But admitting there was some irregularity in the proceedings of the collector, for want of proper notices, or want of demand or levy on the tenant, the purchaser is not bound to inquire into these matters further than to know that the person selling had lawful authority for his proceeding, and not whether he was proceeding with perfect regularity. It was so decided in the case of Williams *vs.* Hickman, 2 Harr. Rep. 463; which was the case of a purchaser, at a constable's sale, where there had been no appraisement, the Court held that though an appraisement was necessary to the legality of the sale, the want of it would not affect the rights of a purchaser at such sale; much less make him, as is contended in this case, a trespasser for taking away the property purchased at the sale.

Verdict for defendant.

Whitely, for plaintiff.

Rodney, for defendant.



SAMUEL CROSSAN'S Adm'x. *vs.* SAMUEL GLASS, Adm'r of DAVID JUSTICE, deceased.

Judgment on an award in a case against an administrator, is a judgment of assets, and does not bind the defendant personally, unless assets be found, although there be no plea of plene administravit.

A judgment was rendered in this case on the award of a referee, in an action of assumpsit. The award did not find assets, and the judgment was entered generally, in a suit brought against the defendant as administrator, in which he pleaded the general issue, and there was no plea of plene administravit.

A fi. fa. was issued against him as administrator, which the sheriff levied upon his own goods.

Mr. Whitely now obtained a rule to show cause why this levy should not be set aside.

Mr. Wales, showed cause.—The action was brought against the

defendant as administrator. He pleaded the general issue non-*assumpsit*, and did not plead that he had fully administered the estate. This was an admission of assets. The case was then referred to Judge Hall, who made award generally. There being no such plea of want of assets, the judgment is in effect a judgment *de bonis propriis*.

Whitely.—The award of the referee does not find assets, and the act of assembly says that the judgment against an executor or administrator on the report of referees, shall not be conclusive that he has assets, unless it be found by the report that he has assets. (*Dig. 225.*) This judgment therefore, is one of assets, and the execution properly follows it, and commands the sheriff to levy on the goods of the intestate in the hands of the administrator; but the sheriff has levied on the goods of the administrator.

The Court set aside the levy. It might happen in case there are no assets, that by this levy the administrator would be compelled to pay the debt, without any means of remuneration.

Levy set aside.

Whitely, for the rule.

Wales, contra.



The STATE, use of MARY TEMPLE in her own right and as assignee of THOMAS TEMPLE *vs.* ELISHA HUXLEY.

The interest of an heir at law in intestate lands cannot be attached so as to prevent an assignment.

By assignment in the Orphans' Court, all liens created by an heir at law are removed.

The heir's interest is changed into personalty, and secured by the recognizance.

Quere. Whether the heir's interest in the recognizance may not be attached?

THIS was a scire facias on the recognizance of Elisha Huxley in the Orphans' Court, dated 7th of September, 1842, on the purchase of intestate lands, conditioned to pay to the parties entitled their respective shares of \$959 96, the amount of the sales of the intestate lands of Alice Pennock, deceased, after deducting costs, &c. The plaintiff was entitled to one-sixth in her own right; and claimed another sixth as assignee of Thomas Temple, as to which share the defendant pleaded, that on the 7th of August A. D., 1841, a writ of

foreign attachment issued out of the Superior Court at the suit of Hannah Wilkenson against Thomas Temple, under which all the right, title, and interest of said Thomas Temple, of and to the said lands and tenements mentioned in said recognizance, were, on the said 7th of August, 1841, taken and attached, and such proceedings were afterwards had, that the said Hannah Wilkenson, at the May term, 1842, recovered judgment in said attachment against the said Thomas Temple, for the sum of \$264 46, with costs, &c., &c. This plea was demurred to; and the plaintiff took a verdict for \$38 28, on the other pleas, subject to the opinion of the court on the demurrer.

Per Curiam.—We consider that the plea interposes no objection to the recovery of the whole amount for which the jury have found their verdict.

The act of assembly declares that the acceptor or assignee of intestate lands shall take, by force of the assignment in the Orphans' Court, all the title which the intestate had at the time of his death, and shall hold the same paramount to all incumbrances created by any heir of the intestate, or by any person claiming under him: therefore, if Thomas Temple had even confessed a judgment in this court, prior to the assignment in the Orphans' Court, the purchaser or assignee under the Orphans' Court, would take all the title of the intestate without reference to such lien.

This is the case of an attachment laid upon the land, and not upon the recognizance. Whether the share of a party under the recognizance might not be attached in the hands of the recognizor; or whether the creditor would have any remedy in a court of equity, are not questions now before the court. The attachment was laid, in this case, before the assignment of the land in the Orphans' Court; but on this assignment the entire interest of Thomas Temple in the land was divested; all liens created by him, or acquired by others on his interest in the land were removed; and that interest was changed into money and secured by the recognizance.

Demurrer overruled.

Wales, for plaintiff.

Gilpin, for defendant.

WILLIAM INSKEEP and JOHN INSKEEP vs. SUSAN SHIELDS and others.

Trespass quare clausum fregit may be maintained against a wrong-doer by a person having a naked possession, without title; but not against a person having title.

Title by occupancy and use, what? Adverse possession; mixed possession; what? and how marked?

A fact recited in a deed, will be taken to be true against the parties to the deed, and all claiming under them; and they are estopped forever from denying the truth of what is so solemnly affirmed.

THIS was an action of trespass quare clausum fregit, for breaking the plaintiff's close, and cutting down timber trees and carrying them away. The pleas were not guilty, and liberum tenementum in Susan Shields, one of the defendants, by whose command the other defendants entered. To the second plea the plaintiff made a new assignment. The defendants pleaded to the new assignment, not guilty; and issue was joined.

The trial was had at New Castle, at November term, 1845. It involved title to a small piece of land (about three acres) near plaintiffs' mill-dam; and adjoining to, or a part of defendants' farm. A mass of evidence, written and oral was introduced; the plaintiffs relying mainly on possession, and frequent use of the land, for a great number of years, for repairing their dam. They also put in a deed which they supposed to be a part of defendants' title, and which excluded this lot. The defendants claimed that it was a mixed possession; that any title which the plaintiffs had shown by paper, amounted to no more than an easement; and that a recital to one of his title deeds recognized the right in defendants' ancestor, and bound them by way of estoppel.

The points in dispute, both of law and fact, appear from the charge.

Booth, Chief Justice.—Plaintiffs must show: 1st. That they were in the actual and immediate possession of the premises where the trespass is alledged to have been committed at the time of the trespass. 2d. That the trespass complained of was committed by the defendants.

1. What is termed a mere naked possession, that is, a possession without right or title, or interest in the land, is sufficient to maintain this action against a wrong-doer. (*Browne* 212, 413; 45 *Law Lib.* 44.) It is sufficient against every person, except the person who has the legal right, title, or interest in the premises. Therefore, if the defendant, Miss Shields, has shown the legal title to be in her, neither

she nor the other defendants, acting under her authority, are trespassers; and if such title has been shown, the plaintiffs cannot recover in this action. The plaintiffs may show that they have acquired a legal title, either by a chain of paper title, that is, by deeds of conveyance to them, or to those under whom they claim, or by an adverse possession. Such adverse possession must be exclusive; hostile to the right of ownership of all others; continued so far at least twenty years, and must be marked by definite and distinct boundaries. But in this State it has not been considered necessary that such boundaries should be indicated by fences.

If it appears that there was a mixed possession in respect to this lot; that is, if acts of ownership have from time to time been exercised by both parties, the law adjudges the possession to be in that party who shows a legal title.

Both the plaintiffs must be shown to be in the actual possession at the time of the commission of the trespass. If only one be in possession, unless it be shown that he is a joint tenant, tenant in common, or co-parcener with his co-plaintiff, this action cannot be supported. It is a misjoinder of parties, and is such a defect, that if it appears on the face of the plaintiffs' declaration, it is fatal upon a general demurrer, or a motion in arrest of judgment, or on a writ of error. And if it appears on the trial of the cause, the plaintiffs cannot recover.

If the plaintiffs have shown that they were both in the actual and immediate possession at the time of the trespass, they must, secondly, show that the defendants, or one of them, committed the trespass. Not only those who actually commit a trespass are guilty, but those who direct or order it to be done. The defendants plead the general issue, and alledge that the freehold was in Miss Shields, and that the other defendants acted by her authority. This makes it necessary for the plaintiffs to prove all the allegations before mentioned as essential to maintain this action. If the defendant has shown a legal title in herself, either by deeds of conveyance, or by an adverse possession of such nature as before mentioned, the verdict ought to be for the defendants.

The defendants contend that as the plaintiffs claim under the deed of Wm. Patterson and wife, to Samuel Patterson, dated July 28, 1780, they are bound by all the recitals in that deed, and cannot gainsay them. This is on the principle of what is called in law an *estoppel*.

A person is said to be estopped when he has done some act which

the policy of the law will not permit him to deny. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent the many evils resulting from uncertainty, confusion, and want of confidence in the intercourse of men, if they are permitted to deny that which they have deliberately and solemnly asserted and received as true.

Hence, if there be a recital of facts in a deed, there is a solemn engagement by the parties to the deed that the facts are true as they are recited. In a deed of conveyance of lands, the general rule is, that all parties to the deed and those claiming under them, are bound by the recitals in the deed which operate on the interest in the land conveyed, and are estopped from denying that those recitals are true.

Verdict for plaintiffs.

Gray, for plaintiffs.

Rodney, for defendants.

SUPERIOR COURT.

SPRING SESSIONS,

1846.

JAMES P. BARKER and wife, appellants *vs.* THEOPHILUS SPICER,
respondent.

Appeals from the register of wills, in probate cases, are tried by the court, and not by a jury.

On such appeal, the Superior Court has the power to direct an issue for trial at bar, in a proper case, though the register has refused it.

THIS was an appeal from the decree of the register of Sussex county, admitting to probate the will of Captain Lewis Spicer.

Mr. Layton proposed to try the appeal by jury, and on oral testimony. He said there was nothing in the constitution directing the mode of trial; that such was the course of trial by the civil law, in probate, and admiralty causes, and was consistent with our practice on appeals from other inferior jurisdictions. (He cited, 1 U. S. Dig. 166; 1 Paige Rep. 550; 3 Dall. 327; 2 Yeates 167; 3 McCord 475; 4 Mass. Rep. 593; 1 Pet. Dig. 225; 7 Cranch 107; Dig. 420, 218, 221.)

Houston and *Woolten* said it was a novel idea; contrary to uniform practice, and without any constitutional warrant. The appeal is to the *Court*; and the record presents no issues for jury trial. It is to be tried on the same evidence as was heard below, the depositions being sent up for this purpose.

Layton replied.

By the Court.—The practice under the amended constitution, as well as under the constitution of 1792, which are the same in this respect, has uniformly been to try appeals from the register, in probate cases, by the court. We have examined the records for more than thirty years back, and find no case of trial in the appellate court otherwise. Indeed, on this record we know not what the jury could try, or how they could be sworn. And this is in conformity with the

course of trial in all other appeals, except appeals from judgments of justices of the peace, which is provided for by act of assembly. The cause is tried on appeal on the same evidence as was heard in the court below.

The probate of wills is in the first instance with the register; and, if he thinks proper, he may, in his discretion direct an issue to try any facts by a jury. Upon an appeal from his decision, whether he have directed an issue or not, the trial is by this court, and not by a jury.

If it appear from the record that the register refused an issue which this court thinks he ought to have granted, his decision may be reversed for this cause; and the case remanded with a view to have an issue directed. In general, a will ought not to be established against the heir at law without an issue, when he prays one at a proper time; but there may be cases where it should be otherwise.

The case cited from *2 Yeates' Reports*, shows that the Supreme Court of Pennsylvania, setting in appeal from the register, on a question of probate, considered itself authorized to direct an issue of *devisavit vel non*. Whether this court has such power, under our constitution and laws; or whether in this case it would be proper to exercise it, might be proper for consideration. But there is no such application before the court; the case having been argued on the assumption that the trial was to be by jury, and on fresh testimony.

As the record stands the appeal is for trial before the court, upon the record and depositions taken below.

Mr. Layton, now moved the court to direct an issue of *devisavit vel non*, to be tried by a jury at bar.

The Court inclined to affirm its power to order an issue of *devisavit vel non* to be tried by a jury; but directed the appellants to proceed in the argument to show on what facts developed by the testimony he claimed the exercise of this power in the present case; and, after argument, they refused the issue; and affirmed the register's decree.

Layton, for appellants.

Woolen and Houston, for respondent.

ROBERT W. SMITH and wife vs. JOHN DOLBY and SARAH DOLBY.

The execution of a will by the testator's *mark*, is a sufficient *signing* within our statute of wills.

In a case of undoubted capacity, it need not be proved that the will was read to, or by, the testator.

The formal execution of a will is a publication.

A will can be revoked only by substitution, or by cancelling; except in cases of implied revocation.

THIS was an issue of *devisavit vel non*, sent by the register of wills, to try whether the paper annexed was the will of Isaac Dolby, deceased. It was dated the 17th of February, 1844; and there was a codicil dated the 15th of March, 1844.

Mr. Cullen produced the will, and proceeded to prove the *factum*. The attesting witnesses proved that after the testator signed the will, by making his mark, he said he should like to hear it read, but he was not able sit up. He said that Mr. Ellegood (the draftsman) had written a will for him once before, and it was not as he wanted it; but, he added, "may be this is." Isaac Dolby had ten children. The codicil was read. The will was brought to Dolby by Ellegood. His name was already written to it with a space for the mark. He made his *mark* and said it was his will.

Mr. Layton, in opposition to the will, said that to make a valid will the testator must be *of age*; of *sound* and *disposing mind* and memory. The will must be *in writing*, *signed* by the testator, or by some person subscribing the testator's name *in his presence*, and by his express direction, and attested and subscribed, in his presence, by two or more credible witnesses. He contended that the signing by a mark was not sufficient under the statute; nor was it sufficient that the testator's name was written by another, though at the testator's request, if not in his presence. He opposed this will on three grounds:—1. There was no sufficient *signing* by the testator. 2. The testator did not hear the will read, and there was no evidence that he knew its contents. 3. There was no proof of the publication. (*1 Robts. on Wills* 93; *1 Phil. Ev.* 379; *3 Stark. Ev.* 1694, n.; *1 Phil. Ev.* 379, [425,] 380; *2 Ves. Rep.* 459.)

He agreed that in deeds a signing by mark is sufficient; but contended, that the statute of wills requires something more, namely, the identity of handwriting. (*1 Vesey, jr.* 11, *Ellis vs. Smith*; *2 Ve-*

sey, sen'rs. Rep. 459; 1 Wils. Rep. 313; 17 Vesey 358; 18 Ves. Rep. 175; 8 Vesey, jr. 185.)

Saulsbury and *Cullen*, contra.—1. As to the signing by mark.

The Court.—It cannot be necessary to hear further argument on this point. It has been long considered settled. The construction of the statute of Car. has always been such. (3 *Lev. 1*; *Freem. Rep. S. C.*) The statute of frauds requires a *signing* as well as the statute of wills, and deeds as well as wills might be impaired by a contrary decision. It would also be no little inconvenience to exclude all persons unable to write their names, from the capacity to make a will by signing their mark. But the point has been ruled by this court. In the case of *Rash vs. Purnell*, 2 *Harr. Rep.* 448, the Superior Court authorized a verdict in favor of a will signed by the testator's *mark*; and that in an issue of *devisavit vel non*. We re-affirm that decision; and hold that the signing of a will by the testator making his *mark*, is a good signing.

2. It was not necessary to read the will over; there is sufficient evidence that the testator knew its contents; and he will be taken to have known them unless the contrary appear. (3 *Stark. Ev.* 1684.) There is no case, except perhaps, where children are entirely disinherited, where any proof of reading the will is necessary. And even this is only in cases of doubtful capacity in the testator. (2 *Ecc. Rep.* 361; 2 *Adams* 441.)

3. The execution of the codicil was a republication of the will. It contains a ratification of the will. The loose declarations of the testator as to any slight dissatisfaction with the will is no revocation. The will cannot be revoked unless by cancelling, or by a subsequent valid will. (*Dig. 556, 315.*)

Mr. Layton replied.

Verdict for the will.

Layton, for plaintiffs.

Saulsbury and *Cullen*, for defendants.

The register afterwards decreed, disallowing all the costs; from which an appeal was taken; and this court, at the October term, 1847, modified the decree so far as to charge the estate with the costs of the probate before the register, and of the trial on the issue on the point of execution; disallowing all the other costs.

SOLOMON DEPUTY, d. b. *vs.* ISAAC BETTS, p. b.

On a certiorari, errors not specified in the exceptions will not be considered by the court.

A justice of the peace may adjourn a cause without the application of either party, if the record shows that the adjournment was necessary.

Appearance of parties cures prior defects.

Referees may adjourn a cause to a day certain, for consideration or award; and they may do so without the application of either party.

The record must show that all the referees were sworn, though the award of a majority will be sufficient.

A new trial must be demanded, but need not be had, within fifteen days after the judgment.

General exceptions, not specifying any error in particular, will not be regarded.

CERTIORARI to Alanson Dickerson, Esquire. The exceptions sufficiently appear from the following judgment of the court.

Booth, *Chief Justice*.—1. The first exception states “that the cause was not continued by the justice, from the 29th of March, 1845, to the 12th of April, 1845, as the same should have been continued, according to the form of the act of the general assembly in such case made and provided.”

This exception is vague and uncertain. It ought to have stated some particular defect in the record; as no error will be considered by the court, unless specially alledged. In *Tinley vs. Todd*, 2 Harr. 290, the exception to the record was, “that no warrant or summons was issued or served, according to the act of assembly in such case made and provided.” The court decided, that the exception was too general; and that it ought to have pointed out the particular error intended to be relied on.

2. The second exception alleges, “that the cause was adjourned from the 29th of March, 1845, to the 12th of April, 1845, without the oath of either plaintiff or defendant, required by the act of assembly, to justify a second continuance; the cause having first been continued by the justice, from the 15th of March, 1845, to the 29th of March, 1845.”

The record shows that neither of the parties appeared on the 15th of March, 1845, the return day of the summons; for which reason the justice (as he was bound to do) adjourned the cause to the 29th of March, 1845; that both parties appeared on that day, and claimed a trial by referees; and that a summons was issued for the referees, to appear on the 12th of April. The case was therefore, necessarily adjourned to the 12th of April; because until then, it could not be tried. In such case no affidavit of either party was requisite. But

the appearance of both parties on the 12th of April, was a waiver of all objections to both the first and second adjournments, supposing any objection could legally exist. The justice, where the trial is before himself, may adjourn the cause, without the application or oath of either party; where such adjournment appears from the record to be necessary for the purposes of justice, and for a fair trial between the parties. (See *Wright vs. Hayes*, 2 Harr. 390.)

3. The third exception is, "that the cause was continued by the justice, from the 12th day of April, 1845, a third time, to the 26th day of April, 1845, without the oath of either plaintiff or defendant, to justify said third continuance."

The record shows that the parties and referees appeared on the 12th of April: that the referees were duly sworn and went into the trial; but, for want of witnesses, the referees adjourned the cause to the 26th of the same month. The exception alleges, directly contrary to the record, that the justice continued the cause; whereas the referees made the adjournment, and not the justice. They had authority to do so; he had not. In the case of *Kinney vs. Adams' garnishee*, 2 Harr. 359, this court decided, that the law regards this as a trial by and before the referees, and not before the justice; that he has no power to interfere with such trial, other than to compel the attendance of witnesses, or to aid and protect the referees in the execution of their duty. The act of assembly, by conferring upon referees the power to hear the allegations and proofs of the parties, and to determine the matters in controversy, gives to the referees the implied power of doing such acts as are essential to the faithful performance of their duty. Therefore, when in their judgment it becomes necessary, for the purpose of doing justice between the parties, to adjourn the cause to a particular day; to hear witnesses, or to obtain written evidence, or to deliberate upon their award; they have the right to make such adjournment, without the application or oath of either party.

4. The fourth exception is, "that the cause was further, a fourth time, continued by the justice, from the 26th day of April, 1845, to the 10th, (but of what month is not stated on the record,) without any oath of either plaintiff or defendant to justify said continuance."

The record shows that pursuant to adjournment, the referees met on the 26th of April, 1845, (the parties being present,) and adjourned to the 10th day of May, 1845, manifestly for the purpose of making their award on that day; that they all met on that day, and made and returned to the justice, an award in writing, signed by two of

the referees. The adjournment for such purpose, was proper and legal.

5. The fifth exception is, "that the cause appears to have been heard by the referees, and before the justice on the 10th day of May, 1845, in the absence of both plaintiff and defendant."

This exception is not supported by the record. The cause was not heard on the 10th of May, by the referees or before the justice; but was adjourned by the referees to that day, not for further hearing; but for making and returning the award. The parties having notice of the prior adjournments, might have attended on the 10th of May, had they chosen to do so. It was not necessary that the award should be made, and returned to the justice, in the presence of the parties.

6. As to the sixth exception: The record shows that all the referees appeared on the 12th of April, were duly sworn, and went into the trial of the cause. It is no objection that but two of them signed the award.

7. The seventh exception, "that no valid or lawful judgment was rendered by the justice upon any valid and lawful report of referees," is altogether vague and uncertain. The exception ought to show specially, in what particular respects, the judgment and report were not valid or lawful. The report was made and judgment rendered according to it, on the 10th of May, 1845, for the plaintiff against the defendant, specifying the sum mentioned in the report; and also the amount of the costs. The report, and entry of judgment, are in conformity with the act of assembly.

8. The eighth exception alledges, "that it does not sufficiently appear upon whose application the new trial was granted; that it was error, if granted on the application of the plaintiff; and was equally erroneous, if granted on the application of the defendant.

The record distinctly shows, that there was a report and judgment in favor of the plaintiff, for twelve dollars, exclusive of costs; that both the plaintiff and defendant, within fifteen days from the day of giving the judgment, demanded a new trial; which the law says, shall be granted in a case like this, on the application of the defendant. It is difficult to perceive how the granting of a new trial on the application of the defendant, which the justice, in such case, is bound to grant, becomes a matter of error, because the plaintiff has also made a similar application.

9. The ninth exception alledges, "that the granting a new trial was erroneous, because the remedy of the party aggrieved was by way of appeal from the judgment."

The only remedy of the defendant was a new trial. He demanded it, and the justice, (as by law he was bound to do,) granted it. The remedy of the plaintiff, if aggrieved, was by way of appeal from the judgment. But this cannot make it error to grant a new trial on the application of the defendant.

10. The tenth exception alleges against the record, "that neither of the parties had notice of the granting of a new trial;" whereas the record shows that both parties were present when a new trial was demanded and granted.

11. The eleventh exception states, "that it does not appear at what time the new trial was granted, or that the seventh day of June, 1845, on which day the referees were summoned to appear, was within fifteen days from the day of granting the new trial."

The record expressly states, that the new trial was demanded and granted within fifteen days from the day of giving the judgment, which is all that the law requires. It is no defect, because the record does not show that the day appointed for the appearance of the referees was within fifteen days from the day of granting the new trial. The fair inference from the record is, that it was within fifteen days. But admitting it was not, it is no error.

12. The twelfth exception is, "that the cause was continued from the 7th day of June, 1845, to the 18th of June, 1845, without the oath or affidavit of either the plaintiff or defendant."

The record shows, that the referees were summoned to appear on the 7th of June, 1845, and that they and the parties appeared on that day; that the referees were duly sworn; went into the trial of the cause; and after hearing the witnesses and parties, adjourned to the 18th of June, 1845; on which day they met; made a report under their hands, and returned the same to the justice; who gave judgment according to the report. The directions of the act of assembly in these respects have been strictly complied with. The affidavit of either party was neither requisite nor proper.

13. The thirteenth exception is too vague and uncertain. It does not point out in what respects the referees had not been lawfully appointed, or had no right to audit and settle the cause between the parties. The record clearly shows, that they were legally appointed, and had a right to try and determine the cause upon the second trial. The first trial was by referees, and claimed by both parties. In *Wright vs. Hayes*, 2 Harr. 391, it was decided, that after a party had claimed and had a trial by referees, a subsequent trial may be had by the same mode, without a renewed application for a

trial by referees. The election of the party controls the mode of trial; and once made, it continues as to all subsequent trials, unless it be waived.

14. The fourteenth exception is, "that the report of the second set of referees was illegal, informal, and unjust."

15. The fifteenth exception is, "that the judgment rendered by the justice for the sum of \$18 06, in favor of Isaac Betts against Solomon Deputy, was illegal, unjust and unauthorized."

16. The sixteenth exception is, "that the execution issued upon said judgment was illegal and void."

These exceptions, the 14th, 15th, and 16th, are each too vague and indefinite. They do not specify any particular defect. It does not appear from the record, that there was any illegality or error in the report of the referees appointed on the new trial; or in the judgment of the justice on their report; or in the execution which was issued upon the judgment. All these proceedings are in strict conformity with the law; and the execution is in the very words and form prescribed by the act of assembly.

The opinion of the *Court* is, that the judgment and proceedings below be affirmed.

Layton, for defendant.



DANIEL HUDSON *vs.* LEVIN PETTIJOHN.

On the trial of an appeal, the record of the justice's judgment is not admissible in evidence; but if read without objection, it is not sufficient ground to set aside the verdict, and for a new trial.

This was an appeal from the judgment of a justice of the peace, in an action for money had and received. Trial and verdict for plaintiff.

On motion of the defendant's counsel, rule to show cause why the verdict should not be set aside, and a new trial granted, on the ground that the record of the judgment and proceedings below were read to the jury, and taken by them from the bar.

Cullen, showed for cause; 1st. That there was no affidavit of the fact that this paper was taken from the bar; and 2d. That the record of the justice was read during the trial without objection, and it was

therefore in evidence. It is in fact proper evidence for certain purposes, viz., to show the origin of the cause, and the appeal.

A new trial will not be granted for the admission of improper evidence, unless there be ground to believe that injustice has been done by its effect. (12 *Wend. Rep.* 41; 2 *Tidd's Pr.* 907; 2 *Taunt.* 12.)

The causes filed for a new trial do not even alledge that any injustice has been done, and there is no affidavit of the party. Even on affidavit filed, the court will not go out of it on a hearing for new trial, or to set aside an inquisition or sale of lands.

Layton replied, that no affidavit was necessary as the reading of the paper in evidence was shown to the court; and it is admitted that it was taken from the bar. Such a paper carried to the jury room, suggesting to them the judgment of the magistrate below, cannot but have an improper influence on the minds of the jurors.

The Court discharged the rule, on the ground that the admissibility of the transcript in evidence was not objected to at the time; and though it was not strictly regular to read this paper, or take it from the bar; the one was done without objection, and the latter was not likely to produce such an influence as to vitiate the verdict.

If a verdict should be set aside for the introduction of any evidence, however unimportant, and admitted without objection, it would be scarcely possible for any verdict to stand.

Rule discharged.

Layton, for the rule.

Cullen, contra.



AMOS STAYTON *vs.* MATILDA MORRIS.

The failure or want of consideration cannot be pleaded against a specialty. Fraud in obtaining it may; but not fraud in reference to the consideration, as a breach of warranty, or false representations of the value of goods for which the bond was given.

DEBT upon specialties. The declaration contained several counts on single bills. The defendant pleaded; 1. Non est factum. 2. That each of the said several single bills in the said several counts of the plaintiff's declaration mentioned, was obtained from the defendant, by the plaintiff, through and by means of the fraud, covin, and misrepresentations of the plaintiff, upon the sale of a certain

mare by the plaintiff to the defendant; which said mare, the plaintiff falsely and fraudulently represented to the defendant, to be sound, &c.
3. Payment. 4. Set-off. To the *first, third* and *fourth* pleas, the plaintiff replied and took issue; and to the *second plea*, he put in a general demurrer.

Mr. Cullen, for plaintiff, cited, 1 *Chit. Cont.* 461; 2 *Johns. Rep.* 177; 13 *Ibid* 430; 2 *Mass. Rep.* 159; 7 *T. Rep.* 471; 4 *Wend.* 471; 8 *Cowen* 290; 4 *Kent* 465.

Mr. Layton, contra., cited, 1 *Arch. N. P.* 218; *Ibid* 94, 98; 6 *Car. & P.* 511.

By the Court:

Booth, Chief Justice.—The want or failure of consideration cannot be set up against a specialty. Being under the party's seal, it is conclusive evidence of a sufficient consideration. Therefore, to avoid a bond or other specialty the defendant must show either fraud in the execution, or a want of due execution or delivery of the instrument; or that the subject matter or consideration is forbidden by statute or by the common law; or is against good morals or the general policy of the law; or that the specialty was obtained by duress; or that the party was incapable of executing it, by reason of infancy, coverture, incompetency of mind, or drunkenness.

But the breach of a warranty as to the quality of goods sold, cannot be pleaded in discharge of a bond; nor can any parol declarations or representations, however false or fraudulent, as to the quality of an article sold, for the price of which the bond was given, be pleaded or given in evidence in a court of law, to avoid a specialty.

Judgment for plaintiff on the demurrer.

Cullen, for plaintiff.

Layton, for defendant.



The STATE, for the use of COVERDALE vs. FOWLER and others.

In an action against a constable for neglecting to execute process, he cannot plead the defectiveness of his writ, unless it be for want of jurisdiction.

THIS was an action of debt on a constable's official bond. The declaration set out the bond, and assigned the following breaches:
1. Averring that theretofore, to wit, on the 20th of April A. D., 1838, at, &c., before J. C. Esq., one of the justices of the peace, &c., the

said Israel Coverdale, by the judgment of said justice, recovered against a certain Nelly Redden, the sum of \$38 05, for a cause of action within the jurisdiction of said justice, &c., upon which judgment afterwards, to wit, on the 6th of May A. D., 1841, at, &c., execution was issued by said justice, directed, &c., and duly placed in the hands of the said Warren Fowler, then being one of the constables, &c., to be executed. Breach, that although there was sufficient goods of the defendant in said execution, the said W. F., constable as aforesaid, would not levy the said execution as he was commanded, &c., but neglected, &c. 2. That the said W. F., constable, &c., would not make due return of said execution as commanded, &c., but neglected, &c.

The defendants pleaded among other pleas: 2. Performance; 4. That the judgment in said declaration mentioned, was rendered in favor of said Israel Coverdale against the said Nelly Redden, on the 20th of April, 1838, and the said pretended execution was issued on the 6th of May, 1841, a period of more than three years from the rendition of the judgment, without the same having been revived by a scire facias against the said Nelly Redden.

The plaintiff demurred to the 2d. and 4th. pleas, and took issue on the others.

Cullen, in support of the demurrer. 1st. A plea of performance to a declaration setting out a breach is bad. 2d. Every matter set out in the fourth plea is set out in the same terms in the declaration. The defendant should then have taken issue or demurred to the declaration, and not pleaded. A party cannot plead that which is already admitted by the previous pleading: for the other party can answer it no otherwise than as he has before stated.

But the plea assumes that it is a good defence for the constable's default of levying this execution, that it issued irregularly; as if the officer could set up this defect, or the writ itself could be avoided in this action. A public officer cannot dispute his authority except for want of jurisdiction. This execution was only voidable at the instance of the defendant. It was a good authority for the officer to levy or sell upon. (8 Johns. Rep. 361; 15 Ibid 97; 13 Ibid 578, 529; 1 Cowen 711, 736; Watson's Shff. 38-9, 33-4; 3 Caine's Rep. 267; 12 Wend. Rep. 96; 8 Cow. Rep. 192; 1 Wend. Rep. 16; 1 Hall's Rep. 579.)

The court stopped *Mr. Cullen* and called on the opposite counsel to proceed.

Layton.—I do not dispute the law, but take the distinction between

void and voidable process. This execution was merely void. (*Dig.* 347, § 29.) "After the expiration of three years without an execution, none shall be issued, until the judgment shall be revived by scire facias." This execution therefore, was void from the beginning; but if this is not a sufficient answer, I will ask leave to withdraw these pleas, and plead over.

The Court afterwards gave judgment for the plaintiff on demurrer to the second and fourth pleas.

The judgment was quod recuperet; and, by agreement, it was referred to the prothonotary to ascertain the amount, with stay of execution four months.

Cullen, for plaintiff.

Layton, for defendant.



SAMUEL L. HALL *vs.* WILSON L. CANNON.

Every contract to do work, implies that it is to be done with skill and care, according to the nature of the work to be done; and that the contractor has the necessary knowledge and skill to do it.

The employer is not bound to accept any other performance; but if he in any manner sanctions it, and derives any benefit from it, the contractor may recover accordingly.

If a price was stipulated, the plaintiff in such case recovers in proportion to that price, subject to deductions for any defectiveness; if not, he recovers on the quantum meruit.

An admission made in an affidavit between other parties, is evidence of the fact against the party making it.

KENT, April term, 1846. This was an action of assumpsit, for work and labor, on a contract by plaintiff with the defendant, to do the joiner's work on a vessel, the barque "Fairmount."

Mr. Bates said there was a special contract, but that it had been varied by consent; that the substituted work was nearly finished, and to complete it, the plaintiff placed hands on board the vessel; but the defendant discharged them, and took off his vessel. This act (the removal of the vessel) would entitle the plaintiff to recover as for the whole work. He claimed \$500.

Ruth, for defendant.—The contract of plaintiff was to complete the joiner's work on the "Fairmount," for \$350. Hall commenced the work, and went on for some time very well, but he left it often, and employed house-carpenters to do it. They were not qualified to do

ship-joiner's work, without the presence and direction of a joiner, and Hall was not there often enough even to give them instructions. When the vessel was launched, the joiner's work was still unfinished; and remained unfinished when she went to Philadelphia. It was done very roughly. After she got to Philadelphia, two ship-joiners valued the work at \$240; and its defectiveness injured the sale of the vessel at least \$200.

The defendant offered in evidence the record of a libel, filed by the present plaintiff, in the District Court of the U. S., against the hull of the barque Fairmount, lately owned by Wilson L. Cannon; which libel was dismissed for want of jurisdiction. The record was offered for the purpose of getting in evidence the affidavit of Hall, which admitted a payment of \$77, on account of work done. This evidence was objected to, as being *inter alios*.

By the Court.—The record is between the same parties, for the same cause of action. The libel was filed by Hall, against the barque Fairmount and owners. Cannon intervened and filed his answer; to which Hall replied. It is evidence for or against either of these parties, for any purpose; particularly as proof of an admission made by the plaintiff, of a credit, the admission being made in his affidavit. His answer in chancery, even between him and a third person, would be evidence. Record admitted.

Layout., to the jury.—We declare not upon any special contract, but on the common counts for work and labor, and on a quantum meruit. No special contract has been proved; but if it had, we have shown that the work was done according to a substituted plan, and was accepted by the defendant without objection. (8 *Pick. Rep.* 178; 10 *Johns. Rep.* 36; 4 *Wend. Rep.* 285; 7 *T. Rep.* 181; 21 *C. L. R.* 203-14; 24 *Ibid* 210. We do not understand that this is controverted.

Smithers.—I agree that you are properly in court on the quantum meruit.

Layout.—Then the question is, what ought we to have for our work? It is now too late for plaintiff to object that the work was not properly done. He made no such objection until called on for payment.

Smithers and Ruth, to the jury.—1st. In the action of assumpsit on the quantum meruit, the question is not how much loss the plaintiff sustained, or how much time or pains he took to do the work? but it is, how much benefit the defendant derived from it? (2 *Stark. Ev.* 877-9; *Ibid* 57.) 2d. Where there is a specific contract for work

and labor; and the price fixed; the plaintiff cannot recover more than the stipulated price. Hall could never have recovered more than \$350 for doing *all* the work. He, of course, can recover no more for doing less than was contracted for. I agree that if the contract or amount of work were enlarged *by agreement*, the additional work may be recovered for in this action; but not otherwise. 3d. As this is an action on the quantum meruit, the plaintiff cannot recover, as he might in an action on the case, anything by way of damages for being turned off from the work, delayed, or any other such matter. The simple question is, what work did the plaintiff do, and what benefit did the defendant derive from it? This barque was built expressly for sale in the Philadelphia market; so proved by three witnesses. And only one witness has testified that the work was done properly, or so as to be fit for that market.

Bates, in reply, denied that the principle of recovery was the benefit to the defendant, and not the labor, or loss, or inconvenience, of the plaintiff. A party may order work done which may be of no benefit, or may be an actual injury to him; yet the person who does the work, may recover whatever he deserves to have.

Booth, Chief Justice.—Assumpsit is an equitable action, and plaintiff can only recover the amount to which, under all the circumstances of the case, he is justly entitled in equity and good conscience.

The plaintiff in this form of action must prove: 1st. The contract of the defendant. 2d. That the work and labor was done by the plaintiff. 3d. The price of the work.

1st. In this case it is admitted, that there was a contract between these parties; under which, plaintiff was to do the joiner's work on board the barque, and that the defendant was to pay him for it. 2d. It remains then for the plaintiff to prove, in order to be entitled to a verdict, that his work was done faithfully, according to the contract; or, if not done according to the contract, he must show that joiner's work was done by him, which the defendant adopted, and which was therefore, of some benefit to him.

But if it appears that the plaintiff has been guilty of mismanagement, or misconduct in his work; so that by reason of such mismanagement, or misconduct, no benefit whatever has been derived by the defendant, the plaintiff is not entitled to recover. And the reason is, that wherever a person undertakes, and is employed to perform a work requiring skill and labor, and fails to perform it in a good, skilful and workmanlike manner, so that the employer derives

no benefit whatever, the person employed is not entitled to recover any part of his demand.

Where a man holds himself out to the world as a person of skill and competency in any particular trade or calling, and is employed to perform work in that trade or calling, the law implies a contract on his part, to do the work in a skilful and workmanlike manner.

In such cases the employer purchases the skill, labor and judgment of the workman or mechanic, and no man ought to undertake such work, if he does not know that he is competent to perform it in a proper, skilful and workmanlike manner. But if the defendant has in any way acquiesced in the improper or inferior work, or has suffered the plaintiff to perform it, and taken it off his hands, he is bound to pay for whatever benefit or advantage he has derived from the work of the defendant.

In cases where there is an agreement that a specific sum shall be paid for the performance of any work, the plaintiff, though he has faithfully performed it, cannot recover beyond the price specifically agreed on; and if part only of the work be done, the plaintiff is not entitled to recover more than the proportion which the value of the work done, bears to the specific price agreed on for the whole. And where a price has been specified, the plaintiff's claim for such specific sum, may be reduced by the defendant showing that the work done was of an inferior description and value to that contemplated or agreed on by the parties.

If the jury believe from the proof in the case, that the defendant interfered to prevent the plaintiff from performing the whole contract, yet the plaintiff by adopting this form of action, viz., *indebitatus assumpsit*, can recover no more than the value to the defendant of the work actually done. The only question, therefore, is whether Wilson L. Cannon, the defendant, has been *actually benefitted* by this work, and how much or to what extent. If he has, then to the extent or value of that benefit, the plaintiff is entitled to recover, and nothing beyond. Therefore it follows, that if the jury from the proof before them, are satisfied that the work was unskilfully or defectively executed; such an amount as is proportionate to the injury sustained by the defendant, from such unskilful or defective execution of the work, ought to be deducted from the price. But if it appears from the proof in the cause, that the defendant instead of being benefitted, has actually been injured by the unskilful manner in which this work has been performed, the plaintiff is not entitled to recover any thing. And therefore, if the jury are satisfied by the proof in the cause, that

the defendant was injured in the sale of the vessel, or otherwise, by reason of the unskilful or defective execution of the work, to an extent equal to the value of the work done, the defendant is entitled to a verdict.

Verdict for plaintiff, \$291 50.

Bates and Layton, for plaintiff.

Smithers and Ruth, for defendant.



HENRY COLESCOTT, d. b. *vs.* WILLIAM M. BONWILL.

Judgment by *default* cannot be signed until the usual time of closing business for the day, unless a certain hour is fixed for the hearing, with due notice thereof to the defendant.

CERTIORARI to Justice Simpson.

The record showed that the case was, at the request of the defendant, adjourned to a particular day, at two o'clock, P. M., when the plaintiff appeared; and defendant not appearing, the case was postponed to three o'clock, P. M., when the justice gave judgment by default: after which the defendant appeared and claimed a trial, which was refused on the ground that the defendant had not used due diligence. This was the exception.

Smithers, for exceptant, argued that the justice had no authority to enter judgment against the defendant, by default, for non-appearance on the day to which the case stood adjourned, if at any hour of that day the party presented himself for a hearing.

The Court affirmed the judgment. If the adjournment had been general to a particular day, the justice should not enter judgment by default, until the usual time of closing business for the day; but where the adjournment is to a certain hour of the day, and so made in the presence of the defendant, or with notice to him, the justice is not bound to wait beyond that hour; otherwise, all the business before him might, by the negligence of the defendants, be postponed to the last hour; when it would be impossible to hear and determine it.

Judgment affirmed.

Bates, for plaintiff.

Smithers, for defendant.

JACOB PRICKETT *vs.* ABNER HERRING.

Quere. Will not the court order up the original record of a justice of the peace, when upon a certiorari it is alledged that the record sent up is not the true record? And has not the court power to punish for an improper alteration of the record?

CERTIORARI to Justice Walston. Record returned. Exceptions filed.

The plaintiff below alledged diminution, and had an order for a further return; on the coming in of which, it appeared to the court that all the exceptions were met.

Smithers, for the defendant below, moved an order on the justice to bring up the original record; upon an allegation that the record had been changed after the certiorari was taken: and he exhibited two transcripts, one taken before, and the other after the certiorari, differing from each other, and both differing from the record.

The Court were inclined to make the order, with a view to examine, and if necessary to correct or punish, the misconduct of the justice of the peace, under the act of 1760, *Dig.* 104; but it afterwards appearing that the justice who made the return was out of office, and the records in the hands of a successor, it was apparent that such an order was useless for this purpose.

Bates, for plaintiff b.

Smithers, for defendant b.

ROBERT CLOTHIER, d. b. *vs.* THOMAS J. CLARK.

A justice's entry of a judgment may be aided by reference to the marginal entry of amount.

KENT, October term, 1845. This was a certiorari directed to justices Pratt and Stevenson, to send up the record in a case of holding over demised premises.

The record returned, showed that a warrant was issued by the said justices, on the 22d of May, 1845, under the act "concerning forcible entries and detainers, and also concerning tenants holding over their terms after notice to quit." (*Dig.* 283.) The parties appeared; a jury of twelve men was summoned and qualified, and

"after a full investigation of the case," rendered a verdict for the plaintiff in the following words, viz.: We the subscribers, jurors duly sworn or affirmed, to inquire diligently and impartially concerning the complaint stated in the annexed warrant, and to find a true verdict thereupon according to the evidence, upon our oaths and affirmations respectively do find for the plaintiff; and we do assess the damages on occasion of the premises to the sum of five dollars, lawful money of the United States. Witness our hands," &c. &c. [Signed by all the jurors.] The record then proceeded as follows: "upon the verdict for the plaintiff, the justices give judgment for the plaintiff, that the plaintiff have possession of the premises, and recover against the defendant cost of suit; and a warrant for delivery and levying the cost is thereupon awarded. Judgment for damages \$5; cost of suit \$22 87." Warrant of possession issued; and also execution for damages and costs. The exceptions were: 1. That the judgment did not follow the verdict, nor agree with the same, nor was it warranted by the act of assembly; because the verdict finds the amount of damages, and the judgment was for costs only. 2. Because the execution did not follow the judgment, it being for damages, where there was no judgment for any damages.

Frame, for the exceptant.—The only authority the justices have in such a case as this, is derived from the act of assembly. (*Dig. 283.*) They have no common law powers in the matter. Their judgment must follow the finding of the jury, and not be other or different from it. It is equally clear that the execution must follow the judgment, which this does not. The execution agrees with the verdict, but not with the judgment.

Comegys, for plaintiff.—The whole entry of judgment must be taken together. That portion of it which is expressed by words only, forms only a part of the judgment: it is completed by that which follows, and the whole makes a complete judgment, such as the act of assembly requires. But if the court consider that the written words only constitute the judgment of the justices, and that they are in themselves insufficient to make such a judgment as the law requires, still the defendant insists that such entry is aided and made complete by reference to the summing up of the judgment which follows, upon the principle of the case of *Booth & Jump*, 2 *Harr. 461.* Again; the defendant insists, that if the court should be of opinion that the entry of judgment aforesaid is insufficient, yet the judgment ought not to be reversed; because there is sufficient upon the face of the proceedings to warrant the court in directing an

amendment: that is, the verdict of the jury, the short entry of judgment, and the execution which was issued. (*Dig.* 290, § 15.)

The objection to the execution of course fails if the court determine the judgment to be sufficient; but the execution is according to the form prescribed by law.

Frame, replied.

By the Court:

Booth, Chief Justice.—1. The record shows that the verdict was in exact conformity with the act of assembly; the judgment which follows, is partly in form drawn out, and partly in short, in words and figures; and signed by the justices. It is a judgment for damages, as well as for costs, and for restoration of the premises.

The argument in opposition to this judgment, proceeded on the ground that the justices exceeded their jurisdiction, which is a special one, and they ought to be held strictly within the delegated powers. The matter found by the jury was damages as well as costs, and the justices rendered a judgment for damages as well as costs. The act prescribes no form for the entry of judgment, and enough appears on the face of this record to show not only that the justices intended to give judgment for damages but did give that judgment. We cannot perceive any difference in principle, as to the construction of this judgment between this case and the case of *Booth vs. Jump*, 2 Harr. Rep. 461.

2. The execution follows the judgment, and is in entire conformity with the form prescribed by the act.

Judgment affirmed.

Comegys, for plaintiff.

Frame, for defendant.



Lessee of GEORGE GREGG vs. JOHN McDANIEL.

Verdict set aside for the introduction of intoxicating liquor into the jury room.

In this case, after a trial at bar, and verdict for plaintiff;

The Court, on motion, and after argument, set the verdict aside, and granted a new trial, on the ground that intoxicating liquor had been introduced into the jury room and used, pending their deliberations.

In the argument of this motion, the following authorities were cited: 1 *Burr. Rep.* 393; 1 *Wm. Blac.* 348; 7 *Cowen Rep.* 362; 4 *Ibid* 31-6; 2 *Tidd Pr.* 814-15-16; *Bac. Abr. Verd. H.* 8, 11.

Rodney, R. H. Bayard and *Whately*, for plaintiff.

Gray and J. A. Bayard, for defendant.



JAMES CHAMBERS *vs.* JOHN FENNEMORE'S ADM'R.

An executor or administrator is not bound to lead the act of limitation in all cases to which it would apply.

An unqualified acknowledgment of a subsisting debt by an administrator, and of his liability to pay it, will prevent the bar of the act of limitation, without an express promise to pay.

Thus, an account settled and an agreement under hand admitting the balance due, will have such effect.

And the administrator may be sued upon such an agreement in assumpsit on an account stated with him, though the original cause of action against his intestate might have been barred by limitation.

NARR. in assumpsit on an account stated with the intestate, *and also with the administrator*. Pleas non assumpsit; payment; discount, and the *act of limitation*.

The suit was commenced May 10th, 1845, and was sustained by proof of the following settlement under hand. "Jan. 6, 1840. This day James Chambers and Thomas Fennemore, administrators of John Fennemore, deceased, settled, and there was a balance due from the estate of John Fennemore to James Chambers, of \$249 10."

Mr Wales, made the point that this written acknowledgment under the hand of the administrator, of a sum due the plaintiff, was not sufficient to entitle the plaintiff to recover without an actual promise of payment.

The Court charged the jury that the plaintiff was entitled to recover; and told the defendant's counsel if he wished to argue this question more fully, whether this evidence of a settlement was sufficient to prevent the bar of the statute of limitation, he might move for a new trial for misdirection.

Verdict for the plaintiff, and rule to show cause why a new shall not be granted.

Mr. Wales.—It is not competent for an administrator by acknowledging a debt, to take it out of the act of limitation. The protection

and security of decedent's estates, require that a mere acknowledgment shall not have this effect. Such an acknowledgment, without an express promise to pay, will not take a case out of the act of limitation. An acknowledgment by both executors, and a promise by one to pay, is not sufficient: There must be an express promise by *all* the executors. (2 Wms. Ex'rs. 1197; 21 Eng. C. L. Rep. 478; 12 Wheat. Rep. 565; Cox Digest 465; Toller Ex'r. 343, 429; 1 Eq. Ca. Ab. 309; 15 Ves. jr. 498.)

Rogers.—This question depends on our own statutes. The English decisions, as well as their statutes on this subject, have been conflicting; but in this State, at least since the case of Newlin and Duncan, the law is settled. Under the act of 1782, § 5, the executor was not authorized to pay any debt barred by limitation. That act was varied by the act of 1793, which provided, that the former act should not apply where there was an acknowledgment of a subsisting demand under the hand of the party. Such an acknowledgment is equal to a promissory note. In *Newlin vs. Duncan*, the Court of Appeals decided, that the mere acknowledgment of a debt was evidence of a promise to pay it. (1 Harr. Rep 204.) The same principle is recognized in *Black's executors vs. Reybold*, 3 Harr. Rep. 528.

In the present case there is no evidence that the claim was ever barred by limitation. It does not appear but that the demand was of a character to which the statute did not apply.

The writing is not a mere recognition, but a promise to pay the debt. It is an instrument upon which an action might be brought, without resorting to any thing else. (1 Harr. Rep. 214; Dig. 397.)

Wales.—The case of Newlin and Duncan refers to an acknowledgment by the original debtor; and I do not question it as to this. But it is different as to the acknowledgment of one acting in a representative character. The exception in the act of 1829, (Dig. 397,) has reference to settlements made by the original parties, and not persons acting in a representative character. No case has been shown, or can be shown, from any court of authority, deciding that the mere acknowledgment by an administrator of a debt due, without a promise to pay it, will revive a debt barred by limitation.

Curia advisare vult.

Booth, Chief Justice.—This was an action of assumpsit, commenced on the 10th of May, 1845, and tried at the May term, 1846. The declaration contains two counts. The first count is upon the

promise of the intestate, for goods sold and delivered, money lent, and, money paid by the plaintiff; money had and received by the intestate for plaintiff's use; and for money found to be due from the intestate to the plaintiff, on an account stated between them. The second count is upon the promise of the defendant as administrator, to pay the plaintiff the sum of \$249 10, found to be due to him from the defendant, as administrator, on an account stated between them.

The pleas are: 1. Non assumpsit. 2. Payment. 3. Discount.
4. The act of limitation.

Upon the trial of the cause, the plaintiff offered no evidence under the first count, but relied on the second count; the only evidence in support of which, was a written acknowledgment under the hands of the parties in these words: "January 6th, 1840. This day James Chambers, and Thomas Fennemore, administrator of John Fennemore, deceased, settled; and there was a balance due from the estate of John Fennemore, deceased, to James Chambers, of two hundred and forty-nine dollars and ten cents."

(Signed) JAMES CHAMBERS.

THOMAS FENNEMORE, Adm'r.

The defendant's counsel insisted that the original demand against the intestate was barred by the act of limitation, and that the plaintiff was not entitled to recover, because there was no express promise by the administrator, to pay the balance ascertained to be due on the settlement made between them.

The court charged the jury, that the written acknowledgment was sufficient evidence to support the second count in the declaration, and to entitle the plaintiff to recover. Under this instruction, the jury found a verdict for the plaintiff for \$344 24; being the amount of the principal sum of \$249 10, and its interest.

The defendant's counsel obtained a rule to show cause why the verdict should not be set aside, and a new trial granted; and filed the following reasons: 1st. Because the verdict is against the law and the evidence in the cause. 2d. Because of the misdirection of the court in their charge to the jury, in declaring to the jury, that the evidence produced by the plaintiff was sufficient to sustain this action.

At the hearing of the rule, the defendant's counsel assumed in his argument, that the original demand against the intestate was barred by the act of limitation; and then contended, that no acknowledgment of an executor or administrator, whether by parol or in writing, of a debt due from him in his representative character, prevented

the operation of the act, unless such acknowledgment was accompanied by an express promise to pay: that the written acknowledgment under the hands of the plaintiff, and the defendant as administrator, contained no express promise on the part of the latter to pay the balance found to be due upon their settlement; and, therefore, that such written acknowledgment did not prevent the bar of the act of limitation.

To this argument it may be answered: 1st. That it does not apply to the case. 2d. That it is not sustained by the decisions of the courts in this State, or by the case cited in its support. As the plaintiff offered no evidence in support of the first count, it could not appear that the original demand against the intestate was barred by the act of limitation, either before or after his death. The plaintiff proceeded entirely upon the second count, and relied on the promise and undertaking of the defendant, in his character as administrator, to pay the balance found to be due to the plaintiff, on the account stated between them. This constituted a good cause of action against the defendant in his representative capacity; distinct from, and independent of, the original demand against the intestate. (*Smith's Adm'r. vs. Forty*, 4 Carr. & Payne 126; 19 Com. Law Rep. 306.)

An account stated is an agreement, by both parties, that all the items are true. It changes the character of the original debt, and is a new contract or undertaking. The stating of the account is the consideration of the promise to pay the sum found to be due; and therefore the items need not be proved. (*Trueman vs. Hurst*, 1 Term. Rep. 42; *Foster vs. Allanson*, 2 Term. Rep. 482.)

In the present case, the written acknowledgment under the hands of the parties, was the only evidence offered under the second count. It was admitted without objection, and was amply sufficient to sustain it. It showed that an account was stated and settled between the parties, in relation to claims and demands existing between the plaintiff and the intestate in his life time; that upon such settlement, a balance of \$249 10, was found to be due from the intestate, and that the defendant, as administrator, promised to pay it; thus proving a new cause of action against the defendant, for which the plaintiff was entitled to recover, without reference to his original demand against the intestate. The written acknowledgment is equivalent to a promissory note, or any other unsealed instrument, containing an admission of a debt, and a promise to pay it. The only question that could arise in this cause respecting the act of limitation, was, whether

the cause of action under the second count was barred: and clearly it was not; because by the 5th section of our act, (*Dig.* 397,) "when the cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting demand, the action may be commenced at any time within six years from the accruing of such cause of action." Here then, is an acknowledgment under the hand of the defendant, as administrator, of a subsisting demand, signed the 6th of January, 1840, upon which a suit is instituted on the 10th of May, 1845; and, therefore, is not within the operation of the act of limitation.

2d. Admitting that the plaintiff offered evidence in support of the first count, and it clearly appeared, that the original demand against the intestate was barred by the act of limitation; still the plaintiff was entitled to recover upon the second count founded on the account stated. The position that no acknowledgment by an executor or administrator, either by parol, or in writing, of a debt due from him, in his representative character, prevents the operation of the act of limitation, unless accompanied by an *express* promise to pay the debt, is not sustained by the decisions of our own courts, or by the case cited in support of the position. An unqualified and unconditional acknowledgment of a present, subsisting debt, and that the party is liable and willing to pay it, has always been held in this State, to take a case out of the act of limitation; and since the act of 1829, such an acknowledgment by an executor or administrator is sufficient for that purpose, in an action against him, for a debt due from the deceased. An express promise to pay, is not necessary, either by the original party, or by his personal representative. Our courts have always held, as between the original parties, (and since the act of 1829, the principle applies to executors and administrators,) that the acknowledgment revives the old debt, and is a waiver of the statute. Hence, an acknowledgment made after action brought, has always been received in this State, to prevent the bar of the statute; although in England, it has been lately decided otherwise. (*Bateman et al. vs. Pinder*, 43 Com. Law. 873.) But in an action against an executor or administrator, for a demand against the deceased debtor, if it be material for the plaintiff to avail himself of a promise or acknowledgment by the personal representative, to avoid the act of limitation, it is necessary, besides the usual counts upon the original demand against the testator or intestate, to add one or more counts on promises by the executor or administrator in that character. Without such counts, the promise or acknowledgment cannot be

given in evidence, because it does not support the counts upon the original contract of the deceased with the plaintiff.

By the statute 9 Geo. 4, chap. 14, sec. 1, no acknowledgment or promise by words, is sufficient to take any case out of the operation of the statutes of limitation. For such purpose, the acknowledgment, or promise, must be made or contained by or in some writing, to be signed by the party chargeable thereby. It is remarked by Tindal, C. J., in Haydon, assignee of Sutton vs. Williams, 7 Bing. 163; 20 Com. Law Rep. 87, that the statute did not intend to make any alteration in the construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, since the statute 9 Geo. 4, chap. 14, whether, in a given case, the written document amounts to an acknowledgment or promise sufficient to take the case out of the statute of limitation, is no other inquiry, than whether the same words, if proved before the 9 Geo. 4, chap. 14, to have been spoken by the defendant, would have had a similar operation and effect. As an express promise, either by the original party liable, or by his executor or administrator, to pay the debt, was at no time necessary to take the case out of the statute of limitation before; neither is it necessary since the 9 Geo. 4. An acknowledgment by the party, which contains a direct admission of a present, subsisting debt, and raises an implied promise to pay, is equally sufficient since, as it was before the statute. The case of Tulloch vs. Dunn et al. executors of Hanley, cited for the defendant, was decided by Abbott, C. J., afterwards Lord Tenterden, at Trinity term, 1826, in the 7 Geo. 4, Com. Law. Rep. 478, *Ryan and Moody* 416. This case is relied upon by the defendant's counsel, as establishing the position that in an action against an executor, an express promise by him is necessary to prevent the operation of the statute of limitation. An attentive examination of the case will not lead to such an inference. The declaration contained the usual money counts, stating promises both by the testator, and the executors. The defendant pleaded the general issue, and the statute of limitation. The testator died upwards of six years before the action was brought; and both the executors had, within six years, acknowledged the plaintiff's demand was due. One expressly promised it should be paid; but the other did not, because it was doubtful whether the payment would be sanctioned by the family. The Chief Justice

nonsuited the plaintiff; because neither an express promise by one of two executors to pay, nor the mereeacknowledgment by both, that the debt was due, but from which acknowledgment no implied promise to pay could be inferred, was sufficient to take the case out of the statute. To have entitled the plaintiff to a recovery, it was necessary either that both the executors should have expressly promised to pay, or that both should have made such an acknowledgment of the debt, as under the circumstances of the case, would have raised an implied promise to pay it. The reason why an express promise, or such an acknowledgment by only one of several executors or administrators, where he is not authorized by the others to act for them, is not sufficient to take a case out of the statute of limitation as to all, is because it does not maintain the issue. The allegation is, that both promised; and the proof is, but one promised. It is wholly unlike the case of an acknowledgment or promise by one of several partners, joint debtors, or makers of a promissory note, which is received as evidence against all; because, as there is a joint interest among them, an admission by one, is an admission by all. And if several executors or administrators authorize one to transact the business of the deceased's estate, they would be bound by his express or implied promise. That Lord Tenterden never meant to lay down such a rule as the defendant's counsel contends for, is manifest from his opinion, and that of the other judges of the King's Bench, in the case of *M'Culloch vs. Dawes and another, executors*, reported in 22 *Com. Law Rep.* 385; 2 *Dowling & Ryland* 40. The case was decided at Michaelmas term, 1826, 7 Geo. 4; five months after the case of *Tulloch vs. Dunn et al. executors of Hanley*. The case of *M'Culloch vs. Dawes and another*, was assumpsit upon the money counts; laying the promises, first, by the testator in his life time; and secondly, by the defendants as his executors, since his death. The pleas were the general issue and the statute of limitation. At the trial of the cause it was admitted that as to the testator, the debt was barred. The question was, whether an acknowledgment made within six years by Dawes, one of the executors, who had taken upon himself the most active part in the management of the testator's affairs, was such as would take the case out of the statute of limitation. Shortly before the action was brought, the plaintiff called on Dawes, one of the defendants; stated his claim upon the testator's estate; and expressed a hope that the executors would see it settled. Dawes admitted the debt was just, and had never been paid; but that he could do nothing without the

consent of the testator's family. Lord Tenterden, before whom the case was tried, was of the opinion, that this was not such a personal acknowledgment of the debt, or promise to pay it, as would take the case out of the statute, and therefore nonsuited the plaintiff.

Upon a motion to set aside the nonsuit, and for a new trial, the chief justice, and the other judges, never gave the slightest intimation that an express promise was necessary. They were of the opinion, that there was no such acknowledgment of the existence of the debt as amounted to an admission that the executor thought himself liable to pay it; or from which the law would imply a promise to pay on behalf of himself and his co-executor; but that it was a mere reference of the plaintiff to the family of the testator to say, whether the debt should be paid or not. The court admitted the well settled principle, that a mere acknowledgment of the existence of a debt, unaccompanied by a promise, express or implied, to pay it; is not sufficient to take a case out of the statute of limitation: from which it is to be inferred, that had the acknowledgment been accompanied by an implied promise to pay, it would have been sufficient for that purpose; and, therefore, that an express promise is not necessary.

An executor or administrator in this State, is not bound to plead the act of limitation against an unquestionably just and honest debt. In such case he may, consistently with the faithful exercise of his trust, remove the operation of the act by an express promise, or by an acknowledgment accompanied by an implied promise to pay the debt. But if the demand is of doubtful or suspicious character from lapse of time, the death of witnesses, loss of papers, or other circumstances, he is bound to protect the estate by resisting the claim; and has no right to waive any legal defence to an action brought to enforce it. If he does, or if he pays it voluntarily, he acts at his peril; and renders himself liable to those who are interested in the personal property of the deceased.

In the present case, the opinion expressed by me at the trial, remains unchanged. The direction of the court to the jury was right; and the verdict being in conformity with it, ought not to be disturbed. The rule therefore, ought to be discharged, and judgment given for the plaintiff.

HARRINGTON, Judge.—Under the old limitation act of 1792, which prohibited an administrator from paying any account or demand against the estate of his intestate, of longer standing than three years next before the intestate's death, it was held that an administrator could not by his acknowledgment or promise, revive a debt thus

barred, so as to charge the estate. But it does not appear to have been decided in respect to debts not barred at the time of the intestate's death, that the administrator might not by his acknowledgment, prevent or remove the bar of the act. The contrary opinion was maintained by the Court of Appeals, in Parkin's administratrix vs. Bennington. (1 Harr. Rep. 209.)

The act for the limitation of personal actions, passed in 1829, which supplied and superceded that of 1792, omits the provision, which in effect, *required* an administrator to plead the statute, as a bar to every claim of longer standing than *three* years, leaving it in the discretion of an administrator, to use this defence only where the purposes of justice, and fair protection of the estate, require the statute to be pleaded: the exercise of this discretion being subject to review in the tribunals before which he is compelled to account. There is nothing, therefore, in our present limitation laws, that requires an administrator to set up the statute in bar of a claim which he knows to be just; though doubtless, he should be careful on his own account, as well as that of the estate, in declining to avail himself of such a defence: but, if in any case where a claim is barred, an administrator would be justified in suffering a recovery against him, on pleas going merely to the merits, there can be no reason why his deliberate promise or acknowledgment of a debt, should not revive the cause of action. If it be said that this is a dangerous power, it may be replied that it is one which results from his character as the representative of the intestate, unless he is specially prohibited by law; and that such prohibition might operate with great injustice to others. The act of limitation is a good shield, and ought to be used as such, and never for any purpose of fraud; but a law compelling an administrator to use it in all cases, might in many cases make it the known instrument of fraud. And it was probably for this reason, that the legislature, in revising the act of 1792, omitted it altogether. The effect of that omission is, to leave it in an administrator's power to set up this defence or not, at discretion; and to leave him also, with the power of paying, or binding his intestate's estate to pay, claims against which the statute of limitation has run so as to bar them.

In the present case, it appears that the administrator entered into a settlement with the plaintiff, and made a formal acknowledgment in writing, that there was a balance due from his intestate's estate, of \$249 10. It does not appear whether this was a claim barred at the death of the intestate or not; but as the administrator had the

power of paying this claim, or of defending the present suit without pleading the act of limitation, he had also, the power of reviving the debt by his acknowledgment.

The principle upon which a new promise, or acknowledgment, has been held to avoid the bar of the statute, has been understood differently by the courts; and this has produced an apparent, if not a real, conflict in the decisions. The older cases suppose the act of limitation to be based on a *presumption of payment*, which a new promise, or even an acknowledgment of the debt, removes; and in carrying out this principle, it has been held that a promise, even after action brought, would take a case out of the act. (*Yea vs. Fouraker*, 2 *Burr. Rep.* 1099.) But the more recent cases regard the acknowledgment as *evidence of a new promise*; a promise which is itself a *new cause of action*, being supported by the previous moral obligation to pay. (*Pittam vs. Foster*, 1 *B. & C.* 248; *Gowan vs. Forster*, 3 *B. & Ald.* 507; *Bateman vs. Pindar*, 3 *Adol. & Ellis, N. S.* 873.) The principle of the old cases did not require any promise to pay; for an acknowledgment of the debt removed the presumption of payment as fully without, as with, a new promise; and rendered the party liable, even though his acknowledgment was accompanied by an express refusal to pay: the principle of the late cases requires a promise to pay, or an acknowledgment from which a promise may be fairly implied; and this being the cause of action on which a recovery is to be had, the declaration must count upon it.

Our courts have hitherto followed the older cases; and have considered a mere acknowledgment of the debt, as sufficient to take a case out of the reason of the act of limitation, and therefore, out of the act itself. (*Newlin vs. Duncan*, 1 *Harr. Rep.* 204; *Waples vs. Layton*, 3 *Ibid* 508; *Black's Ex'rs. vs. Reybold*, *Ibid* 528.) The Court of Errors and Appeals considered also, in the case of *Newlin vs. Duncan*, that an acknowledgment revives the old cause of action, and does not create a new one; that the declaration is necessarily for the old debt, and not for any new liability. An acknowledgment, (the court says,) rebuts the presumption of payment; and then the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one.

This case being a decision of the highest court in the State, is of course, as far as it extends, binding on us; though I would with great deference suggest, that the principle of the recent English cases is very reasonable. The statute enacts, that no action of trespass, replevin, detinue, or debt not founded on a record, or specialty;

no action of account, assumpsit, or on the case; shall be brought after the expiration of *three years from the accruing of the cause of such action*; and how can an acknowledgment of the debt enable a party to bring such an action *after three years*, unless it be that such acknowledgment gives a new right of action? Why also, is this doctrine of a waiver of the statute confined to actions of assumpsit, if the reason given in *Hurst vs. Parker*, be not the true one, namely, that the acknowledgment is evidence of a fresh promise, which is considered as the promise laid in the declaration, and one of the causes of action which it sets out. In actions against administrators, it is usual, as has been done in this case, to count on a promise by the administrator: and, though it may be very true, that as between original parties, no new promise is laid in the declaration in order to avoid the statute, yet, as time does not enter into the pleading, the new promise when proved, may be considered the promise declared on, and the proper ground of recovery.

I suggest this, however, merely as a doubt. The case cited is the law for our guidance, and it establishes that the acknowledgment is not to be regarded as a new cause of action, but simply as a waiver of the statute, as against the old one. Yet the opinion in that case must be confined to the case before the court; an action between *original parties*, in which the acknowledgment relied on as waiving the statute, may be proved under a declaration on the original cause of action; and not requiring any count on the acknowledgment itself. Otherwise no acknowledgment, after a change of parties, can ever avail to waive the statute, for no such acknowledgment can be given in evidence without a count upon it, as it would not correspond with the declaration on a promise by the original party. The Court of Appeals, in the case referred to, alludes to this distinction. Speaking of an action by an executor, on a promise to himself, to pay a debt due the testator, the Chief Justice said: "In that case, no doubt you must declare on the *new promise*; for every promise, to be binding, must be made by a person competent to make it, and to a person in existence to receive it. (6 *Taunt.* 310; 13 *Com. L. R.* 88.) Besides, if the executor were to declare on the original promise to the testator, and to the plea of the statute of limitation, were to reply the promise made to himself, it would be a manifest departure in pleading, and a good ground for a demurrer. But who ever saw, *as between the original parties*, a declaration on the new promise? The case, therefore, of *Newlin vs. Duncan*, must be regarded as applying only to a suit between original parties; and not extending to

a case where the plaintiff is compelled by the rules of pleading, to declare upon the acknowledgment, or promise, to or by a new party, as a new cause of action. In such case, the new promise or acknowledgment must be regarded as the cause of action, and declared on as such, or it cannot be put in evidence. The cause of action, therefore, declared upon, and proved in this case, is the account stated between the plaintiff and the defendant's administrator; and an acknowledgment in writing, under the hand of the administrator, of a sum due from the intestate's estate. Such an acknowledgment is itself a cause of action; and assumes such a form, in this case, as is protected from the operation of the act of limitation, for the period of *six* years.

Motion refused.

Rogers, for plaintiff.

Wales, for defendant.



PHILIP PLUNKETT vs. JOHN MOORE.

Goods seized on a domestic attachment are in legal custody for the benefit of all the creditors.

On replevin, bond should be taken in an amount sufficient to secure the return of the goods so attached, or an equivalent value.

This action was against the defendant, as late coroner, for default in not taking bond, or not taking *sufficient* bond, upon executing a writ of replevin. The plaintiff, Plunkett, (with one Dougherty,) had sued out a writ of domestic attachment against Lewis Hart, upon which the sheriff, Boys, seized certain goods of Hart to the value, by his appraisement, of \$420. These goods were claimed by Henry Weiser, who was a trustee for Mrs. Hart; and he issued a writ of replevin, directed to coroner Moore, directing him, if Weiser made him safe in so doing, to replevy these goods from the hands of Boys, Plunkett and Dougherty, and re-deliver them to Weiser.

The first question presented was, what was the duty of the coroner, on executing this writ of replevin? The declaration averred that it was his duty to take bond with sufficient surety, in *double* the amount of the *value* of the goods, conditioned that Henry Weiser, the plaintiff in the replevin, should prosecute that suit with effect, and if the plaintiffs in the attachment should recover judgment in the

said action of replevin, that Weiser should return the property, if return thereof should be adjudged; and would pay the plaintiffs in the attachment all such sums of money as might be recovered against him in the replevin suit.

The defendant contended, that it was the coroner's duty merely to look to the amount of bail endorsed on the plaintiff's writ of attachment, and take security in the replevin to that amount, which is double the amount of the plaintiff's own demand.

The Court said, that, under the provisions of the attachment laws, property seized by attachment becomes liable, not merely for the demand of the attaching creditor, but for the claims of all the other creditors of the defendant who shall come in and make proof of their debts before the auditors; and, for this purpose, the property seized is directed, after judgment, to be sold by the sheriff, and the proceeds paid to the auditors for distribution. This property, therefore, though attached for Plunkett's claim, could not be released on securing the amount of that demand; but was in lawful custody for the benefit of all Lewis Hart's creditors; and the coroner was bound, before he took it out of this custody, to secure them as well as Plunkett; and to take such security from Weiser, as on the failure of his action of replevin, would secure a return of the goods to the sheriff for the benefit of Hart's creditors; or payment to him of an equivalent sum, in case return of the goods should not be awarded.

This was manifestly the coroner's duty before executing the writ of replevin. He was not bound to execute the writ until Weiser *made him safe*, and secured him against the consequences; and, as the effect of his executing the writ was to take all this property out of the sheriff's hands, where it was held for the benefit of all Hart's creditors, the obvious indemnity to the coroner, and his obligation to the defendants in replevin, was to take security in such form, and to such amount, as would restore their rights and save him harmless, in case Weiser should fail to sustain his claim on the property.

The form of security in replevin is settled by the case of *Clark vs. Adair*. (3 *Harr. Rep.* 113.) In case of *distress for rent arrear* the condition of the replevin bond is prescribed by act of assembly (*Dig. 364.*) to prosecute the suit with effect, and satisfy any judgment which shall be given against the plaintiff in replevin; and the penalty is double the value of the property: in other cases the amount and form of the security must be such as will effect the object of restoring the rights of the defendants in replevin, and save the officer; which, in this case, would be to prosecute the replevin suit with ef-

fect, and to make return of the goods, if return should be awarded, and pay any amount of damages that might be recovered against him. For though the proper judgment in such case is for a return of the goods, and damages for the taking; yet, “*if the defendant cannot have a return*, he may recover all in damages, if it be found for him,” and after verdict the court will always intend that *the defendant could have no return*; and give judgment for the damages. (*Clark vs. Adair*, 3 Harr. Rep. 116.)

The duty of the coroner, therefore, was, in this case, to take a replevin bond for this purpose; and in a sum sufficient to secure it.

Henry Weiser failed in his replevin suit against Boys, Plunkett and Dougherty. The suit was not prosecuted against Dougherty (who was not summoned); the sheriff made conusance as a public officer, and Plunkett avowed as plaintiff in the writ of attachment. The suit resulted in a verdict and judgment for him, for damages to the amount of \$420. The replevin bond taken by the coroner, on executing the replevin, is only in the sum of \$200; and this suit is brought against him for neglecting to take sufficient security.

It is objected that the claim of Philip Plunkett, being only \$70, and fully covered by the security taken, he is not entitled to prosecute an action on the case against the coroner for neglect of duty, as he is not injured by that neglect. But this objection overlooks the fact that this is not Plunkett's claim. It is the demand of the creditors generally of Lewis Hart, to have the property seized restored to the condition it was in when Weiser's replevin took it out of the sheriff's hands, where it was for their benefit; and this suit, though in the name of Plunkett, is not his, but theirs. He could not in this case recover even the amount of his own claim, but must prove it before the auditors, and receive payment by their award distributing the fund. In the case of *Stone vs. Jones* it was decided by this court, that even a *payment* of the attaching creditor's debt would not arrest the proceedings, but that the same would go on for the benefit of the creditors generally, without even substituting another plaintiff.

Whitely, for plaintiff.

Hufington and Rogers, for defendant.

ROBERT W. WRIGHT vs. WILLIAM HOBSON.

A landlord attaching his tenant's *goods*, on affidavit that he is about to remove them from the county, is not bound to support his affidavit by proof of reasonable ground at the next term of the court.

The proceeding by attachment against the *goods* of a tenant, founded on an affidavit of his intention to remove them from the *county*, differs in this respect from proceedings founded on an affidavit of the *tenant's* intention to leave the *State*.

ATTACHMENT for rent under sec. 9, *Dig.* 365, on affidavit of a landlord, that his tenant intended to remove his effects from the county before the rent became due, so as to defeat a distress. The attachment was returnable to the November term, 1844: nothing was done in it at that term; and, at the next term, the defendant obtained a rule to show cause why the attachment should not be quashed, because the affidavit was not properly supported.

The plaintiff now proved the defendant's occupation of the premises, and that in July or August, he had said he was going to move off as soon as his corn was fit to gather. He did move off into Kent county, before the end of the year; after the corn was gathered.

Rogers, for defendant, insisted that the landlord was bound *at the return term of the writ*, to support his affidavit, and show probable cause for issuing the writ, or that the attachment would be quashed. (*Dig.* 366, § 9; 3 *Harr. Rep.* 493, *Grubb vs. Pyle*.)

Rodney, contra.

By the Court.—As between the landlord and tenant, we do not perceive any necessity for holding the party to the return term for moving an order of sale. On the service of an attachment the tenant may release his goods by bond; or may deny the rent and obtain from the court an order for an issue to be tried by a jury. And, if he does not move at the return term, there is no necessity in his behalf, to require the motion to be made at that term by the landlord, for the delay is to the landlord's prejudice.

This is not like the case of *Grubb vs. Pyle*. The proceeding there was under the 20th section of the attachment act, authorizing the *arrest of the body* on affidavit that the debtor was about to leave the *State*. That act requires the plaintiff to follow up his affidavit by proof at the court, of sufficient cause for demanding better security, and expressly provides that the court shall give judgment for costs against the plaintiff if he does not show sufficient cause.

But there is no such provision in relation to the attachment of goods. The attachment issues on the affidavit merely; and unless the defendant gives bond or demands an issue, the court will order a sale of the goods to pay the rent demanded.

The sheriff is liable for the safe keeping of the goods, to be sold pursuant to any order of court properly obtained for that purpose. His responsibility is not greater than the law imposes in many other cases pending litigation in respect of property in his hands. If such property creates a charge in keeping, or is perishable, he has a remedy provided by law on his own application; and perhaps, the unreasonable laches of a plaintiff in procuring an order of sale might discharge the sheriff's liability: of that however, we give no opinion. The question is not involved in this motion.

Rule discharged.

Rogers, for the rule.

Rodney, contra.



AZARIAH H. QUINBY vs. J. W. DUNCAN, special bail of BENJAMIN M. HYATT.

Distinction between "citizen" and "inhabitant," in reference to execution process against the body.

The writ of *ca. sa.* cannot be issued against a citizen of the State, without an affidavit of fraud.

A man is deemed a citizen of his native State until he is shown to have changed, not merely his residence, but his citizenship.

This was a suit by scire facias, on the part of A. H. Quinby against J. W. Duncan, as special bail of Benj. M. Hyatt. The defendant became bail for Hyatt, in the original suit of Quinby vs. Hyatt, on the 8th of May, 1843; and bound himself by recognizance, that Hyatt, his principal, should satisfy any judgment that might be obtained against him in that action, or render his body in execution whenever lawfully called on, or that he would do it for him. The suit against Hyatt proceeded to judgment; and, on the 17th of April, 1844, a *ca. sa.* was issued with a view of fixing the bail; which was returned "non est inventus;" whereupon this suit was brought.

The defence to the action was, that by the act of assembly of 1841, a *ca. sa.* is prohibited from issuing against any "citizen" of

the State, without a previous affidavit of fraud; that Hyatt was a citizen of the State, and no such affidavit had been made. The question, therefore, was whether B. M. Hyatt was, at the time this writ of ca. sa. issued, a citizen of the State, under the protection of the act of 1841.

B. M. Hyatt was a native born citizen of this State, and a resident citizen at the time special bail was entered in 1843; he left the State in the month of August or September of that year, since when he had not been heard of.

Upon this proof the defendant asked the court to charge that the right of citizenship in this State having been established, it continued until it was shown by the other side that the party had acquired a citizenship elsewhere.

The Court said, a man is to be regarded as a citizen of his native State, until it can be shown that he has changed this relation by leaving *animo manendi*, or by acquiring a citizenship elsewhere. (*3 Story Com.* 564, 674.) And this is to be not merely by a change of habitancy or residence, but by a change of citizenship.

It has been contended that the act of assembly of 1841, which prohibits the issuing a ca. sa. against any "citizen" of the State, is to be construed in connection with the act of 1785, which uses the term "inhabitant;" and that, taken together, the restriction intended by the legislature to be imposed on issuing process to take the body, was designed to apply to resident citizens or inhabitants; and that the word citizen, used in the act of 1841, is to be taken in this sense.

It is true, these laws are on the same subject, but they are distinct enactments, applying in terms to different persons, the former to inhabitants, the latter to citizens; and there is nothing from which we can collect that the legislature meant the same thing by both. On the contrary, by the use of different terms, not having the same meaning, we are to suppose they meant different things. A man may be a citizen, without being an inhabitant, of the State; as a man may be an inhabitant, without being a citizen. This is not only an obvious distinction, but one which the constitution itself makes; as in the qualification of voters it requires both citizenship and residence.

We charge the jury, therefore, that if Benjamin M. Hyatt, was a citizen of the State at the issuing of this ca. sa., the writ was illegal and void; and the return made to it does not fix the liability of his special bail, the defendant in this action; and, on the question of citizenship, it being proved that he was a citizen prior to the issuing of that writ, it is incumbent on the plaintiff to show a loss of citizenship

by proof not merely of a change of residence, but of such a change as makes him a citizen of some other State, and deprives him of the rights of citizenship here.

The plaintiff then suffered a nonsuit.

Johnson and Wales, for plaintiff.

Whitely, Bayard and Bradford, for defendant.



ISAAC FREDD, d. b. appellant vs. SPENCER D. EVES, p. b. respondent.

A husband is liable for his wife's contracts, only where his consent can be proved, or is implied by law.

Whilst they live together the law presumes his consent to her contracts for necessaries, if furnished on his credit.

Where the husband supplies necessaries, and gives notice, he is not bound on such contracts.

General notice by newspaper is not sufficient.

Where husband and wife live separate by agreement, he is liable for necessaries, unless he provides her a suitable allowance and pays it punctually; or unless she has otherwise a sufficient separate maintenance.

If the husband deserts his wife, or drives her away, or makes his house unfit for her to remain, he is liable.

Not so if she elopes, or goes away without lawful cause.

The books of a party being evidence, with his oath, of a sale and delivery of goods; he may be cross-examined on this point.

THIS was an appeal from the judgment of a justice of the peace against a husband, in an action of assumpsit, for articles furnished his wife, to wit, carpeting, table linen, clothing, muslin, &c. &c., whilst living in a state of separation.

The plaintiff was called to prove his books of original entries; and proved them. They contained regular charges against the defendant for articles sold.

The defendant proposed to examine him as to whom the goods were in fact sold and delivered; to which it was objected, that the defendant had no right to make him a witness against his will. The evidence was insisted on, upon the ground that the proof of a sale and delivery of goods by books was a statutory privilege to the plaintiff, but only extended to the case where the oath of the plaintiff corresponded with, and did not contradict his book.

By the Court.—The privilege of proving a sale of goods by book entry, and the plaintiff's oath, is a privilege *ex necessitate*; because

the actual delivery of goods cannot, in most cases, be remembered. But the oath of the plaintiff, ought, as far as it goes, to support the book entry; and where the plaintiff is admitted to support his book, it is the right of the opposite party to cross-examine him *on this point*. The provision of the act of assembly is, that the sale and delivery of goods, wares, and merchandize, may be proved by "the oath or affirmation of the plaintiff, together with a book regularly and fairly kept."

On the main question in this cause, the husband's liability, the court ruled the following principles :

Upon marriage, personal property of the wife in possession, belongs absolutely to her husband. He is entitled to the rents and profits of her real estate during their joint lives ; and, in case he survives, having children by her, he is entitled to the rents and profits during his own life.

The wife, during coverture is, in general, incapable of acquiring property of her own, without the husband's consent. The earnings of her own personal industry belong to him. She can do no act, and can make no contract to bind her husband, without his express authority, or unless such an authority is implied by the law. Therefore, it is incumbent on a creditor who brings an action against a husband upon a contract made by his wife, to show that the husband has *expressly authorized such contract, or assented to it*; or to prove such facts or circumstances, as will raise a presumption of law, that the authority or assent of the husband was given to the wife to make such contract.

When husband and wife live together, he is bound to provide her with necessaries suitable to his condition and circumstances in life; and the law, from the mere *fact of cohabitation*, presumes the authority and assent of the husband to the wife's contracts for such necessaries; and, therefore, makes him liable, if they are *supplied on his credit*. But if they are supplied to the wife on *her credit*, and debited to *her*, and not to the husband, on the books of the store-keeper, &c., the husband is not liable. If the articles purchased by the wife, are such as cannot be considered as *strictly necessaries*, he is not liable, without showing his *express authority or assent* to such purchase.

Where a husband, during cohabitation, supplies his wife with necessaries, suitable to her condition in society, and expressly gives notice to storekeepers or tradesmen not to furnish her with goods, he is not liable even for necessities supplied to her, subsequently to

such notice. But a general notice in a newspaper will not be sufficient to discharge the husband, without proof that the paper reached the party furnishing the goods.

Where husband and wife separate by their mutual agreement; and live apart by mutual consent, the husband is still liable for necessaries supplied to the wife, unless he has provided for her, an allowance for necessities, suitable to his pecuniary means and condition in life, and regularly pays such allowance. If he has not provided such allowance, or does not pay it regularly, he is not discharged from the liability which the law imposes upon him of supporting his wife. If she has a sufficient separate maintenance, although no part of it is supplied by the husband, he will not be liable for necessities, because she has means adequate to her support, according to her situation in life.

If a husband deserts his wife, or turns her away without sufficient cause, or compels her by cruelty, or ill-treatment, to leave his house; or where the wife's situation in her husband's house is rendered unsafe by reason of his cruelty or ill-treatment, and she is obliged to leave him under a reasonable apprehension of personal violence; or if by the indecency or gross immorality of his conduct, such as bringing a woman of loose character under his roof and putting her at the head of his table, he renders his house an unfit and improper residence for his wife; in each of these cases, the law considers the husband as giving the wife an authority to pledge his credit for necessities; and he is under a legal obligation to pay the debts which she incurs for necessities. By the common law, he is under an obligation to support his wife, from which he cannot exonerate himself by his own wrongful conduct.

Where a wife elopes from her husband, though not with an adulterer, nor in an adulterous manner; or where she leaves her husband without a justifiable cause, and continues to live separately from him, without his consent, and where he was willing to receive and provide for her in his own house; or if the wife commits adultery, and in consequence of which, the husband turns her from his house; or if after a voluntary separation by mutual consent, she be guilty of adultery; in any of these cases, the husband is not liable even for necessities: nor in such cases, is the husband bound to give notice that he will not be liable; but storekeepers and tradesmen, are bound to make inquiries, and if they furnish goods to the wife, under such circumstances, they do so at their own peril.

Wales and Bradford, for plaintiff, cited, 1 *Esp. Rep.* 441; 8 *Car.*

& P. 503; (34 C. L. Rep. 512;) Rop. Hus. & W. 70; Chitty on Cont. 214; 12 Mod. Rep. 245, 346; 2 Lord Ray. 1066; Paley on Agency 81; Smith L. Ca. 312; 2 Ashm. Rep. 140; Paley Mor. Ph. 118, 121; 12 Johns. Rep. 248; 2 Kent Com. 147-8, n.

Johnson, Patterson and Rogers, for defendant, cited, 1 Kent Com. 146; 1 Selw. N. P. 270; Roper 69; 11 Johns. Rep. 311; 11 Com. Law Rep. 64; 12 Ibid 238; 12 Law Recorder 453.

Verdict for defendant.

Wales and Bradford, for plaintiff.

Johnson, Patterson and Rogers, for defendant.

COURT OF ERRORS AND APPEALS.

JUNE TERM,

1846.

SAMUEL BAILEY *vs.* THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

The State has the right of a proprietor over navigable streams entirely within its borders; and may obstruct, or (unless where restricted by the Constitution of the United States,) may close up, such streams at pleasure. ✓

Such rivers are public highways, and open to all for navigation and fishery; but the legislature may impair or take away these public rights for public purposes. ✓

The riparian proprietors have no individual rights to the river; and are entitled to no compensation for the loss of those which they hold in common with other citizens.

An obstruction of the river, authorized by the legislature, gives no right of action.

An unauthorized obstruction is punished by indictment, and not by private suit.

The act of assembly of 1837, (9th vol. 59,) authorizing the railroad company to erect a close bridge over White Clay creek, is constitutional; and gives no right of action to the owner of a mill above, though damage results to him from the loss of navigation, and obstructing the flowage of water.

But such bridge must be made, and kept up, in conformity with the law. Any additional obstruction is unauthorized; and, if attended with special damage, actionable.

An act giving a right of action for *authorized* obstructions passed after they were made, and not accepted by the railroad company, is a violation of their charter, and of the obligations of the contract with them; and, therefore, unconstitutional.

An act giving a remedy by summary action for *unauthorized* obstructions is constitutional, though passed after the injury sustained.

The assessment of damages by a jury of inquest, returnable to court, is a constitutional mode of trial in such cases.

The Supreme Courts of a State, are obliged to decide on the constitutionality of laws; and, in cases of plain and apparent opposition, to pronounce them void.

QUESTIONS of law reserved by the Superior Court. Heard at June term, 1846, before Judges Harrington, Milligan and Hazzard, and John W. Houston, judge ad litem, in the place of the Chancellor, he and the Chief Justice being legally disqualified to sit.

The defendants were a joint stock company, incorporated in 1832, (8 vol. 107,) as the Wilmington and Susquehanna Railroad Company, with power "to locate and make a railroad across this State from

the Pennsylvania to the Maryland line, between Philadelphia and Baltimore via Wilmington, having due regard to the situation or nature of the ground and of the buildings thereon, the public convenience and interest of the stockholders, and so as to do the least damage to private property," (*sec. 12.*) The said company was authorized (*sec. 13.*) to enter upon any land which they should deem necessary for laying out of said road; and also for the purpose of searching for stone, sand, gravel or wood, for constructing the same. By section 15, it was enacted that "whenever it shall be necessary for the said company to enter in and upon, and occupy for the purpose of making said railroad, any lands upon which the same may be located, if the owner or owners of said land shall refuse to permit such entry and occupation, and the parties cannot agree upon the compensation to be made for any injury or supposed injury, that may be done to said land by such entry or occupation," such damage should be estimated by five disinterested men, to be agreed on by the parties, or appointed by the Superior Court; and on their report being confirmed and the company paying the sum awarded "in full compensation for said lands, or for the injury sustained as aforesaid, the said company shall become seized of the same estate in the said lands which the owner held in the same, and they and all who act under them shall be acquitted and freed from all responsibility for or on account of such damage: provided, that payment of damages for lands through which the said road may be made, shall be made before said company, or any person in their employ shall be authorized to break ground, &c. Section 16, provided "that if in the location of said railroad it shall be found necessary to pass over any navigable river or creek by a bridge or other edifice, it shall be the duty of said company to construct and keep in repair, a sufficient pass or draw in said bridge or edifice, over the channel or deepest part of said river or creek, for the purpose of letting vessels pass and repass through the same; which draw shall at all times, on the approach of any masted vessel or vessels, be drawn at the cost of said railroad company," &c. &c.

By a supplement to this act, passed in 1835, (9th vol. 9,) this company was united with the Delaware and Maryland Railroad Company; and was authorized, whenever it was necessary for them to enter into and upon, and occupy for the purpose of making the railroad, any lands or tenements, they should signify it to five commissioners named by this act, who should thereupon "estimate the damage that may be done to said lands and tenements, by such entry

and occupation ;" on payment of which, the title to the land should become vested in the company. But the owner of the land, if dissatisfied with their report, was authorized to sue out a writ of *ad quod damnum*, to inquire by a jury of twelve men "what damages will be sustained by such owner by reason of said railroad, so passing through any lands or tenements belonging to him, her or them, taking into consideration all the advantages to be derived to him, her or them, by reason of said railroad."

Another supplement, passed in 1837 (9th vol. 59,) united the company with the "Philadelphia, Wilmington and Baltimore Railroad Company," and authorized it to convert the drawbridge erected by it over the White Clay creek into a permanent bridge, "and to keep the draw closed, or dispense with it altogether: provided, that if by accident or otherwise, the bridge should be broken down or destroyed, the company should erect "another bridge over the said creek, at the same place, and of the same height and dimensions, and of the same width between the piers, as those of the present bridge."

By another supplement passed in 1839 (9th vol. 243,) the defendants were authorized to keep a permanent bridge, without a draw, over Boat or Bout creek, at the place where such a bridge was then erected, any thing in the previous laws notwithstanding: *provided*, that the owners of the land lying on said stream, should have the right within six months, to sue out a writ in the nature of a writ of *ad quod damnum*, to inquire by a jury of twelve men, "whether any and what damages have been sustained by such owner or owners, by reason of the said bridge, erected by the said company, over the said stream, being constructed without any draw or pass therein;" and to prosecute such proceeding to judgment and execution; and, *provided further*, that the defendants should pay the costs of a certain suit instituted against them in chancery in relation to this bridge.

This act, which was passed at the defendant's solicitation, with all the acts previously passed, were duly *accepted* by the defendants.

A further act was passed in 1845, (10th vol. 19,) as a supplement to the defendants' charter, extending the "benefits and provisions" which the act of 1839, secured to the owners of land on Boat or Bout creek, "to the owner or owners of any land lying and being on White Clay creek, or on Red Clay creek, as well to recover damages for any injury heretofore sustained, as for injuries that may be hereafter sustained by any of the said owner or owners, in consequence of any act, work, or obstruction, of the Philadelphia, Wilmington and Baltimore Railroad Company, heretofore done or con-

structed, or that may hereafter be made or done: provided, that proceedings for the recovery of damages for injuries heretofore sustained, shall be commenced within twelve months from the passing this act; and within twelve months from the time any injury may hereafter be sustained."

The present proceeding was taken under this last act, which was never accepted by the railroad company.

The plaintiff, Samuel Bailey, was the owner of a mill-seat and mills, on the White Clay creek, above the defendants' bridge. This bridge, with its embankments, &c., were made by the defendants in the years 1835-6; the bridge having then a draw, as required by the original act of incorporation. It was made a permanent bridge, (without a draw,) in the spring of 1837, as authorized by the act of 1837. One of the piers of the bridge was partially prostrated by a flood in January, 1839, and a new pier erected by the side of the old one, occupying about four feet more of the stream of said creek, and diminishing the pass way of the water to that extent. The piers and abutments were placed transversely across the stream, and one corner of each abutment stands in the stream below high water mark; and these, with the piers and embankments, were the obstructions complained of. There was no culvert through the embankments.

The White Clay creek, is a stream lying within the State of Delaware, having its sources in Pennsylvania; navigable to vessels with masts, up to plaintiff's mills before the erection of this bridge, and the tide ebbs and flows up to, and above the bridge, but only within the State of Delaware.

The plaintiff, availing himself of the act of 1845, sued out a writ in the nature of a writ of ad quod damnum, to ascertain whether any, and what damages had been sustained by him, by the erection of the bridge aforesaid, or any other act or obstruction of the defendants.

It was admitted that all the acts, works, and obstructions complained of, were done and made by defendants prior to June, 1839, and a large amount of the damages assessed had accrued therefrom prior to 1840. Also, that the railroad, embankments, bridge, and other works, were not located upon, over, or across the plaintiff's premises; nor has any portion of his land been taken or occupied by the defendants in the making the road, bridge, or other works.

On the execution of the writ, the defendants declined appearing before the jury, and the sheriff returned an inquisition taken on the 5th and 6th of May, 1845, finding damages for the plaintiff to the

amount of \$3,888. Whereupon, on motion of *Mr. Wales*, and exceptions filed, a rule was granted to show cause why the writ and inquisition should not be set aside; and the questions of law arising under this rule were afterwards, by consent, reserved for hearing in banc.

The exceptions relied on, were: 1st. That the act of 1845, by virtue of which the writ issued is unconstitutional and void; being a violation of the vested rights of the said company, and of the Constitution of the United States, and also of this State. That the said act has not been accepted by the defendants, and is partial and unjust in its provisions. 2d. Because neither the bridge, railroad, or embankments referred to, were erected or made on the lands or property of the plaintiff. 3d. Because the defendants were not present or heard before the jury of inquest; and, believing the said act of assembly unconstitutional and void, filed a protest in writing before the said inquest against the said proceedings.

The cause was argued in the Court of Appeals, by *Layton* for plaintiff; and *Wales* and *Frame*, for defendants.

On the constitutional question, *Mr. Layton* cited, *Const. Art. 6, sec. 1*; 1 *Blac. Com.* 160; 12 *Serg. & Rawle* 331, 344; 1 *Ired. Dig.* 140; 4 *Dev. Rep.* 1; 6 *Cranch* 87, 136; 3 *Dall.* 386, 395; 2 *Pet. Rep.* 522; 12 *Wheat.* 270, 370; 1 *Cow.* 550; 4 *Dall.* 14; 1 *Cranch* 137; 1 *Binn.* 415; 13 *Pick.* 60; 7 *Ibid* 466; 2 *Dall.* 309; 1 *Marsh* 290; 11 *Mass. Rep.* 396; 2 *Harr.* 514; 3 *Marsh* 423; 8 *Pick.* 96; 6 *Conn. Rep.* 495; 3 *Story Com.* 250-1, 245-7-9, 266; 12 *Wheat.* 257, 358; 4 *Ibid* 235, 197, 629, 370; 1 *Hill Rep.* 324; 11 *Pet. Rep.* 420; 8 *Ibid* 110; 2 *Ibid* 414; 3 *Dall.* 391; 15 *Serg. & Rawle* 72; 8 *Wheat.* 89; 4 *Ibid.* 200; 12 *Ibid* 370, 262; 4 *Ibid* 425; 1 *Cranch* 109; 9 *Ibid* 374; 4 *Ibid* 384; 1 *Baldw.* 74; 21 *Pick.* 250; 16 *Mass. Rep.* 273; 1 *Paige Ch. Rep.* 107; 2 *Hill* 31, 45; 13 *Wend.* 325; 25 *Ibid* 680; 4 *Hill* 384; 23 *Wend.* 103; 8 *Cow.* 146.

Frame and *Wales*, contra., cited, 2 *Harr. Rep.* 76, 514, 553; 3 *Ibid* 294, 335, 441; 1 *Del. Laws Appx.* 70, 79, 80; 8 *Ibid* 3; *Const. Art. 1, § 9*; 1 *Blac. Com.* 44; *Mag. Chart. Ch.* 29; 2 *Co. Inst.* 50; 6 *Cranch* 135; 9 *Ibid* 52, 535; 2 *Dall. Rep.* 307; 3 *Ibid* 387; 3 *Story Const.* 269; 2 *Pet. Rep.* 414, 419, 657; 13 *Wend.* 328; 1 *Paige Rep.* 107; 11 *Mass. Rep.* 404; 4 *Hill* 140; 5 *Pick.* 69; 4 *Wheat.* 235; 4 *Hill* 76, 92; 2 *Pet. Rep.* 245; 8 *Cow.* 146, 246; 9 *Conn. Rep.* 436.

Judge Harrington, delivered the opinion of the court.

HARRINGTON, Justice.—The case before us, so much elaborated in VOL. IV.

argument, as it well deserved to be on account of the grave questions involved; may be compressed within narrower limits, when the true questions at issue are fairly presented to the mind. Indeed, the argument itself has, by mutual concession, excluded many topics which it will be unnecessary for me particularly to notice in expressing the opinion of the court on the whole matter.

The plaintiff's proceeding is to recover damages alledged to have been sustained by him from the act of the defendants. His writ of *ad quod damnum* directs the jury to inquire whether any, and what, damages have been sustained by him in consequence of the act, work, and obstruction of the defendants, in the construction of a certain bridge and causeway across White Clay creek. He is the owner of a mill-seat and mills on that creek, above this bridge, and has suffered damage, as the proceeding assumes, as the indirect and consequential result of its erection; either from the obstruction in the navigation, impeding the flow of water, or otherwise, which he is entitled to ascertain and recover, by writ and inquisition. Objections have been urged to this *form* of proceeding; and even to the regularity of the writ and inquest; but I wish first to settle the *right of action*, before I examine the mode of remedy, or form of process.

The defendants are an incorporated company, authorized by legislative grant to make a railroad across the State in a certain direction; with power, at first general, and afterwards specific, to make a bridge across the White Clay creek. They were required to locate the road with due regard to public convenience, and so as to do the least damage to private property; and to compensate any person through whose land the road might be located, the damages which he might sustain from their entry upon and use, and indeed their appropriation of his land; for, by the charter, the *title* to the land so occupied is vested in the company on payment of damages. They were authorized to make bridges over such streams of water as it might be necessary for them to cross, being required in respect to *navigable* rivers or creeks to furnish a sufficient draw or passway for vessels, with only two exceptions, one of which was the White Clay creek, and the other, a stream called Boat or Bout creek, in Brandywine hundred. In regard to White Clay creek, the authority to make a close brige was expressly given by act of Jan. 13th, 1837, with the sole condition, that in case of its destruction they should erect another bridge at the same place, and of the same dimensions. The right to make a close bridge over Boat creek was conferred on the defendants, by the act of the 14th of February, 1839, with a pro-

viso that the owners of land lying on said stream should be entitled to inquire by a jury what damages they sustained by reason of the bridge being made without a draw or passway; which damages the defendants were made liable for; and they accepted the power thus given them, with this condition.

Under these legislative grants, with the restrictions mentioned, the defendants proceeded to locate a railroad; and built a bridge over the White Clay creek with a draw, which they afterwards closed; and made a permanent bridge; under the act of 1837. In the location of the road the defendants entered upon no land of the plaintiff, and appropriated none of his property to their use. Neither the bridge, nor its abutments, approaches or appurtenances, have any connection with the plaintiff's property. The defendants, therefore, claim the *right*, by grant from the State, to make this bridge without any liability whatever to individuals, for any obstruction it may occasion to the creek over which it is built.

The leading question, then, in this cause, is, whether there is any such legal liability on the defendants; and, supposing the plaintiff to have sustained incidental and indirect damage from the obstructions caused by this bridge, whether any right of action accrued to him, as against these defendants, for the erection of this bridge by them under the circumstances stated. If such right of action did not exist originally; the next question will be, whether it was lawfully conferred by the act of the 4th of February, 1845.

The White Clay creek, and all other navigable rivers within the State, belong to the State, not merely in right of eminent domain, but in actual propriety. The State retains the right of eminent domain to even private property, or property granted by it to individuals; which is the ultimate right of the sovereign power to resume the grant for public purposes, on payment of just compensation. (11 Pet. Rep. 641, 642; *Vattel B. 1, ch. 20, § 244.*) But navigable streams ✓ have never been granted to individuals; and the State resumes nothing, and of course violates no one's right of property, when, for great public purposes, it uses the waters of such rivers even so as to impede or deprive individuals of their accustomed use of them. It is true, that in relation to great rivers which afford essential means of commerce with other States and the world, certain restrictions are imposed on the States themselves by the Constitution of the United States; but of such a river as this it may be assumed, at least since the case of *Wilson vs. The Blackbird Creek Marsh Company*, (2 Pet. Rep. 251,) that the State has the unrestricted right of a

proprietor over its waters; and may obstruct or close the same, if the public interest or convenience requires it to do so. As a public highway, it is free to all citizens for navigation or fishery; but when the legislature deems it more beneficial to the public to close this highway by a permanent bridge, or to exclude the fish from its waters by a dam, it is a question only of public expediency, and furnishes no just ground of complaint from individuals who have heretofore enjoyed benefits and advantages which may be abridged, or cut off, by the improvement. Much less does it give a right of action. Even if such an obstruction were unauthorized; the unlawful act of an individual; no private right of action would accrue for that which is a common wrong, and a nuisance. The remedy would be general, like the injury; by indictment of the wrong-doer, and abatement of the nuisance. And so with regard to private property situated upon such rivers. The owner of such property holds it, subject to this right of the public to use the stream at the will of the legislature; and if, in the use of it, indirect damage arises to such property, it is an inconvenience to which he must submit, unless the State makes compensation as a mere gratuity. It is *damnum absque injuria*; a damage not merely without remedy, but without right to a remedy; a part of the cost of the party's connection with society, to be set off against its general blessings, or compensated by the use of the river still left to him in a restricted form, and to which he has no better right than every other citizen. Either he must submit to this inconvenience, or the public give up their right to use the river in the mode desired. The assumption that such use of it, authorized by the State, gives him a right of action against any one, is founded on the idea that as owner of land adjoining the river, he has a right to the uninterrupted flow of the river in its natural course, which the State cannot interrupt for any purpose, however general or important the object may be. Such a proposition was pronounced in *Lansing vs. Smith*, to be "too extravagant to be seriously maintained." "It denies, (as the court there said,) to the State, the power of improving the navigation of the river by dams, or any other erections which must affect the natural flow of the stream, without the consent of all the proprietors of the adjacent shore within the remotest limits which may be affected by the operation."

Nor would the evil of such a principle stop here. If the State cannot use its own property for public purposes without liability for incidental damage, much more must it be liable for such damage in the exercise of its right of eminent domain; so that it would be im-

possible to make a railroad or canal, or authorize any other public improvement, without incurring such an indefinite amount of liability as would effectually put a stop to improvement. Every road, public or private, crossed by such railroad or canal, would afford occasion for numberless suits; every person, however remote, who was deprived of any easement or convenience, however slight, though it was held by the same authority that takes it away, would have his action on the case for damages; and, as this would be a continuing wrong, the liability to renewed suits would, in case of special damage, continue to exist, until the projected improvement was abandoned. Such a principle is indeed, too extravagant to be seriously maintained; while the contrary is vindicated not merely by its reasonableness and necessity, but by the authority of repeated decisions of the courts.

In *The Plate Glass Company vs. Meredith, and others*, (4 *Term Rep.* 794,) the defendants acting as commissioners of pavements, under an act of parliament, so paved the public street as to cut off the usual communication to plaintiffs' warehouse, and the court decided that no action would lie for damages. Lord Kenyon said, "if such an action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the legislature do not empower the commissioners to award satisfaction to individuals who happen to suffer, they are without remedy. The interests of individuals must give way to the accommodation of the public:" and Judge Buller said, "if the thing complained of were lawful at the time, no action can be sustained against the party doing the act."

A public navigable river, *prima facie* and of common right, belongs to the sovereign power. The lands of individuals bounding such river are held by grants from or under the State, which grants do not divest the State of its power to improve the navigation, &c., and, for such purposes, it may do every thing for the full enjoyment of its rights; only it cannot take private property for public use without compensation. (*Hollister vs. The Union Company*, 9 *Conn. Rep.* 436, 446.)

The public, as owners of the river, may improve the navigation without liability for remote and consequential damages to individuals. The injury is one to which individuals must submit as the price of the social compact: it is *damnum absque injuria*.

Remote and consequential injuries by turnpike roads, improvements of rivers, or streets, &c., will not furnish a cause of action

against those who are authorized by the legislature to accomplish such object, if they act within their powers, with honesty and discretion.

The statute of New York, authorizing the construction of a basin in the Hudson river at Albany, and erections whereby the docks of individuals above were rendered inaccessible, or less easily approached by vessels, and therefore, much depreciated in value; though it provided no compensation for such a consequence, is not unconstitutional, either as taking private property for public use without just compensation, or impairing the obligation of contracts. This not being a direct invasion of private property, but remote and consequential merely, and arising from a public improvement, the injury is one to which individuals must submit as the price of the social compact, and in the eye of the law the injury is *damnum absque injuria*. (*Lansing vs. Smith*, 8 Cow. Rep. 146.)

The act of 1832, which incorporated the W. & S. Railroad Company, authorized the defendants to make a drawbridge over any navigable river or creek it should be found necessary to cross in locating the road; and the act of 1837, having special reference to the bridge already built over the White Clay creek, gave them authority to convert that bridge into a permanent bridge, without a draw; provided, that if by accident or otherwise, the said bridge should be broken down or destroyed, it should be their duty to erect another bridge over the said creek at the same place, and of the same height and dimensions, and of the same width between the piers, as those of the bridge then erected. Upon the principles before stated, if the act and obstruction of which the plaintiff complains, be the erection or change of this bridge, within the scope and meaning of the authority thus granted by the legislature, these acts afford no ground of action for damages resulting from such bridge, and the plaintiff is wholly without remedy.

2. Supposing him to be without any right of action previous to the act of 1845, we are next to consider the effect of that act which, according to the plaintiffs' construction, and the use to which in this suit it is applied, gives to him a remedy by writ, in the nature of a writ of *ad quod damnum*, to recover damages for any injury *heretofore sustained*, or that may be sustained hereafter, in consequence of any act, work or obstruction of the defendants, heretofore done or constructed, or that may be hereafter made, or done. If this be the true construction and meaning of the act of 1845, it will not be denied, that it necessarily raises the question whether the legislature

can essentially vary the terms of a charter of incorporation without the consent of the company; can make an act duly authorized by its charter, and lawful when done, unlawful; and subject it not only to a general action, but to a summary action for damages, under circumstances where neither the charter, nor common law, give any right of action, or claim for damages. I endeavor to state the question correctly. The defendants' charter authorized them to make and to change this bridge, without imposing on them any liability to pay any incidental and consequential damages to the owners of lands lying on the river. The general law of the land imposes no such liability, and denies that the plaintiff can sustain, in a legal sense, any *injury* from such authorized act of the defendants. I assume, at present, that the bridge is made, and afterwards changed in strict compliance with the authority given by the charter; and the plaintiff contends that the act of 1845, makes the defendants liable to an *ad quod damnum* process, for the recovery of damages sustained by him in consequence of the erection of this bridge. The question then is, as I have stated, whether, after an act of incorporation is duly granted, accepted and acted under, a subsequent legislature can, without the consent of the corporators, essentially change its terms; can make an act lawfully done in pursuance of it, unlawful; and subject the company to actions and damages, where no cause of action existed before. It can hardly be necessary to attempt the argument of such a question; but I will state a few general propositions established by the adjudged cases on this subject.

It was conceded in the argument, that an act of the State legislature which has the effect to impair the obligation of a contract, is unconstitutional and void, under the prohibitions of the Constitution of the United States; and it was further conceded, that the State courts, as well as the courts of the United States, were not only authorized, but bound, to treat such an act as a nullity; because the 6th article of that constitution expressly declares it to be the supreme law, binding on all courts, and judges. While he argued that an act divesting vested rights was not unconstitutional; and further, that this court had no authority to declare any act of the legislature void, merely because it violated the constitution of this State, the counsel for the plaintiff did not deny, but fully admitted, that an act thus violating the Constitution of the *United States*, could not be binding on any one.

An act of incorporation either for public or private purposes is, both in form and substance, a contract. (3 Story Com. 258.) "It confers

rights and privileges upon the faith of which it is accepted. It imparts obligations and duties on the part of the corporators which they are not at liberty to disregard; and it implies a contract on the part of the legislature, that the rights and privileges so granted shall be enjoyed." It is laid down by Judge Story as a general principle, that whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest these rights, or annihilate or impair the title so acquired. (*Ibid* 258.) The charter of this company is a contract between the State and the corporators, that if they will risk their money in making a great public improvement through the State, they shall have the franchises, liberties, and privileges, granted by the charter; subject only to the restrictions, and conditions, which it contains. Among other powers granted, was that of entering upon private property, and making it their own, on payment of damages to be ascertained in a specified mode; the power to make bridges across any rivers or creeks which it might be necessary to cross, provided, that in case of navigable rivers they should make drawbridges; and the express power to make the bridge over White Clay creek a *close* bridge without a draw. The right to make such a bridge is conferred without any condition or obligation to pay damages to any person, other than those whose property might be taken for the use of the company; and the charter was accepted and acted upon by the company, on the faith of a contract implied by the very nature of the grant, that the State should permit them to enjoy the rights and privileges so granted. Whatever may be said, therefore, of the power of the legislature to alter this charter, it cannot be doubted that an act which imposes conditions to the rights so granted, which makes the company liable to damages, where the charter or previous laws imposed no such liability, and which fixes a summary mode of enforcing such claim, and recovering the damages; is an act which not only divests the vested rights of the corporation, but violates the obligations of the contract implied by the charter. A vested right is defined by Judge Duncan, in *Eakin vs. Raub*, "as the power one has to do certain actions, or to possess certain things, according to the laws of the land." Such was the right of the defendants to build this bridge, without any other condition or liability than those imposed by the charter; and which was not only divested by the further imposition of liabilities destructive of the power, but such as violate the contract under which the power was accepted and exercised. I presume no one will doubt that if these liabilities had been imposed by the char-

ter of this company, it would not have been accepted by the defendants. If such a law were made to apply, not only to White Clay creek, and Boat creek, but to all other creeks and streams, (as in justice it ought, if justly applicable to any,) nothing is more certain than that it would defeat the object of every act of incorporation for public improvement which is under any necessity to cross public streams. This would be the strongest proof of the extent of the superadded responsibility of the defendants; but it needs not such a change as that to violate a charter. The manner, or degree, in which this change is effected, says Judge Story, (*3 Story Com.* 250,) can in no respect influence the conclusion. "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes; *imposing conditions not expressed in the contract*; or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impair its obligation." (*Green vs. Biddle*, 8 *Wheat. Rep.* 197-98; *McCullough vs. Maryland*, 4 *Wheat.* 316.)

These principles are further illustrated by the following decisions.

An act of the legislature of New Jersey, declaring that certain lands should not hereafter be subject to taxes, is a contract which cannot be rescinded; and a subsequent law repealing such act is unconstitutional. (*New Jersey vs. Wilson*, 7 *Cranch* 164.)

Insolvent acts which discharge the debtor from future liability for debts contracted previously, are void. (*Sturges vs. Crowningshield*, 4 *Wheat.* 122; *McMillan vs. McNeill*, 4 *Wheat.* 209.)

An act of the legislature of New Hampshire, altering the charter of Dartmouth College, in a material respect, without the consent of the corporation, is an act impairing the obligation of a contract; and is unconstitutional and void. (*Dartmouth College vs. Woodward*, 4 *Wheat.* 518.)

Acts of incorporation, when granted on a valuable consideration, assume the nature of contracts; and vested rights under them are no more subject to legislative power than any other vested rights. (*11 Pet. Rep.* 569.) When land is granted, the State can exercise no acts of ownership over it, unless it be taken for public use; and the same rule applies to a grant for a bridge, a turnpike road, or any other public improvement. (*Ibid* 569.)

Rights legally vested in a corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved in the act of incorporation. (*2 Mass. Rep.* 143, 146.)

If these principles be well established, and apply to the case before
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the court, which, in my judgment they clearly do, it will be unnecessary for me further to inquire, whether the act of 1845, violates the constitution of this State; or to examine at any length into the power of this court to declare an act of assembly void, when it is in direct opposition to that constitution. Yet, I would not let the occasion pass, without repeating what has been over and over again decided by the highest courts and the ablest judges in the United States, almost without exception, that in such a conflict it is not only the right, but the bounden duty, of the courts, to give force to the constitution, and annul the pretended law. The power results from the very structure of the government; and exists for the protection of the people, as well as of the constitution itself. The argument which contradicts it, is drawn from the principles of the common law, and a view of the powers of common law courts, under the British form of government, in reference to the law making power there, which is so transcendental that it has been pronounced omnipotent. Deprive the argument of this basis; namely, the supposed *supremacy* of the legislature over the judicial department, and no just conclusion can be drawn against the judiciary. It assumes that the power which *gives law* must necessarily be superior to that which receives it; and that which may be controlled by the acts of another, must, in its nature, be the *inferior*. I submit that this is mere sophistry when applied to the present matter. The very question is, whether it is *law* that is given; and, whether *in respect of the act under consideration*, the court can be controlled. Both departments derive existence, and all the powers they possess, from the constitution; they are co-ordinate in their several spheres; and the relation of superior or inferior, cannot be ascribed to either. (*Vanhorne's lessee vs. Dorrance*, 2 Dall. 304.) The legislature possesses no inherent power of making laws; and no powers but such as are derived from the constitution, subject to its limitations and restrictions; the leading one being, that it shall make no law contrary to the constitution. Beyond this, it no more represents the sovereignty of the people than either of the other branches of government does; and when it assumes to pass an act contrary to the constitution, it is not a legislative act, and cannot have the force of law. (11 Pet. Rep. 644.)

The judiciary derives existence and power from the same high source. Its business is to administer justice according to *law*; that is, according to the Constitutions of the Government, and the laws passed by the legislature within the sphere of its authority, and in

conformity to the constitution. None other are laws of the land, having any force or effect. In a case, therefore, of plain, palpable, conflict between the constitution and an act of assembly, the court cannot do otherwise than distinguish between that which is law, and that which is not. And, in doing so, so far from arrogating any right to control the legislature in any of its constitutional powers, it is but asserting that which forms the basis of all our institutions,—the supremacy of the constitution itself, and the entire dependence of every department upon the ultimate sovereignty of the people.

It has been remarked by a learned judge, "that no principle can be better established; none more conducive to personal liberty and security of property; none of which the people of this free country can more justly boast; none which so eminently distinguishes our *American constitutions* over every other country and government, than the doctrine which has prevailed since their formation, in the courts of all these States, from Maine to Georgia; *that the people possess the sovereign right to limit their lawgiver, and that acts contrary to the constitution are not binding as laws.* The concurrence of statesmen, of legislators, and of jurists, uniting in the same construction of the constitution, may insure confidence in that construction." (*Eakin vs. Raub*, 12 Serg. & Rawle 359; *Cole vs. Virginia*, 6 Wheat. 401.) I shall refer to no other authority on this point, (though they abound in all the books,) than that which is the highest of all authorities on constitutional questions, namely, the late Chief Justice Marshall. "The judicial department of every government, (says he,) is the rightful expositor of its laws, and emphatically of its supreme law. If in a case depending before any court, a legislative act shall conflict with the constitution, it is admitted that the court must exercise its judgment on both, and that the constitution must control the act. The court must determine whether a repugnancy does or does not exist; and, in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason." (*Bank of Hamilton vs. Dudley*, 2 Pet. Rep. 492, 524.)

If, therefore, the act of assembly of 1845, be susceptible of no other interpretation than the one given to it in the argument, and which I have been considering, it is unconstitutional and void. But I now proceed to show that this act is susceptible of a construction which shall make it harmonize with the constitution, and at the same time carry out an important public object which the legislature may,

be supposed to have had in view in passing it. This is our duty. We are never to suppose an intended violation of the constitution. At the same time, we are bound to place such a construction on the law as will give it effect, if by possibility it will bear such a construction. The courts have gone very far to effect this object. The case of *Eakin vs. Raub*, so much relied on by the plaintiff, not as authority, but for the reasoning of a dissenting judge, is a striking example of the industrious zeal of a court to harmonize the law with the constitution. In *Jones vs. Wootten*, (1 *Harr. Rep.* 77,) the Superior Court of this State decided that a court would never give a construction to an act of assembly which would render it unconstitutional, if the act be susceptible of any other. I submit that the act of 1845, is perfectly capable of such a construction without doing violence to its provisions; by giving to its terms a strictly legal and technical signification, and confining it to such acts and obstructions of the railroad company as were *unauthorized by its charter*, and illegal in themselves. This will make it a law operating only upon the remedy; and not giving, or designed to give, a right of action where none before existed. We have seen that every damage is not in legal contemplation an injury; that there may be *damnum absque injuria*; that there may be acts which occasion damage and loss to a party without conferring upon him any legal redress; and this not merely for the want of any adequate remedy, but because he has no right of action, or just claim to any remedy. The remedy is perfectly under the control of the legislature; the right of action is not. (1 *Kent's Com.* 455.) In accordance with this well established distinction, the act of 1845, provides that the plaintiff shall have a remedy by *ad quod damnum* "as well to recover damages for any *injury* heretofore sustained as for *injuries* that may be hereafter sustained," in consequence of any act, work, or obstruction of this railroad company; that is, for any *unauthorized* act, work, or obstruction, for no other can produce an injury in contemplation of law; and the legislature cannot be supposed to have intended to extend a remedy for injuries which the plaintiff had no right to complain of, and which gave him no right of action. If, therefore, the defendants have done any thing in the construction or maintenance of this bridge that was not authorized by their charter, the remedy attaches, and the act of 1845 has full force and effect.

The views which I have before presented of the rights of these parties under the several acts of assembly, including the act of 1845, were on the assumption that the bridge over the White Clay creek,

was built, and altered, strictly in pursuance of authority conferred on the defendants, by the several legislative grants of 1832, 1835, and 1837. If this be not so, these acts will afford no protection. That it was originally built in conformity with the charter, seems to have been recognized by the legislature itself; for the act of 1837, which authorizes its conversion into a close bridge, requires the defendants, in case it should be broken down, or destroyed, to build another at the same place, and of the same height and dimensions, and of the same width between the piers. The only question then is, whether the bridge, in its altered, or renewed form, is in these respects, similar to the bridge first erected, and existing at the time the act of 1837 was passed; for a bridge of any other height, or dimensions, or at any other place, or of any other width between the piers, being unauthorized, would render the defendants liable for any special damage occasioned by an alteration in its construction. The record shows that this restriction of the act of 1837, has not been attended to. Since January, 1839, the bridge occupies four feet more of the stream of this creek, than is authorized by law; and varies to that extent, which may be a very material one, from the bridge as it was first built, and as it was up to 1837. Whether this deviation was the cause of the injuries of which the plaintiff complains, or any of them, does not appear to the court. Neither the inquisition, nor the testimony taken on the rule, sufficiently shows the source of damage found by the jury, to enable this court to sustain the return on this ground. Indeed, the inquisition itself states that the jury were directed to inquire of the damages sustained by the plaintiff, by the change of the bridge from a drawbridge to a close bridge; which change was entirely authorized by the act of 1837, and afforded no ground for assessing damages. Even if unauthorized, the obstruction to the navigation would afford no cause of individual action, as the injury would be general to all citizens. The testimony of Mr. Faris, one of the inquisitors, was, that this comprised the heaviest item of the claim; and for which, of course, the largest sum was allowed. But, on the principles before stated, this was an injury for which no damages whatever were recoverable; both because the defendants were authorized to obstruct the navigation; and, if they were not, the right of navigation is a right common to all citizens, and the violation of it a public wrong, to be punished by indictment. Mr. Faris also stated, that a part of the damages assessed, was for injury to flour in the plaintiff's mills, caused by the obstruction of the water; but the date of this injury

does not appear, or whether it was caused by the bridge in its original, or altered form. If this damage was caused by any obstruction which the additional four feet of pier caused to this stream, we are of opinion, that this was a proper subject for the assessment of damages; and that the plaintiff is entitled to recover it by force of the act of 1845, under the remedy which it affords by writ of ad quod damnum. For such an injury an action on the case would lie, where special damage resulted to any one; and, there being a right of action, it is perfectly competent for the legislature to provide a new remedy for such right. It is not objectionable, either for removing the bar of limitation, or for furnishing a different mode of trial by jury, from that which applies to ordinary suits in court. The same power that may limit actions, may remove the limit according to its views of public expediency. These acts have always been sustained on the ground that they affected the remedy merely, and not the right. A party is barred of his suit, after a limited time, only because the public interest requires such limitation; if the legislature judges otherwise, and extends the time of limitation, or removes it altogether, no wrong is done to the debtor, by reviving the suspended remedy of the creditor. Neither is there anything unconstitutional in the mode of trial. All land which has been condemned for the use of the railroad, under its charter, has been condemned by this means; and the very validity of their title to the railroad, rests on the constitutionality of this mode of assessing damages. I know these laws have been questioned; but it seems now to be settled, that the legislature, in the assertion of its right of eminent domain, may not only take private property for public use, but prescribe the mode of assessing damages, even without trial by jury. (*Buonaparte vs. Camden and Amboy R. R. Company*, 1 Bald. C. C. Rep. 219) But, in truth, this is a trial by jury, such as was known and used in the administration of justice in this State, on various occasions where the legislature conferred a special remedy, even before the present constitution, the requisition of which, is simply, that "trial by jury, shall be as heretofore." (Art. 1, sec. 4.)

Neither do we think the act is open to any constitutional objection, on the ground taken in argument, that it is a partial, if not a personal remedy given to this plaintiff, and certain other citizens, to the exclusion of all others; and against these defendants only. The remedy is given to all who are liable to the mischief; and against those only, who can do the injury. It is a remedy given to any and every one who is an owner of land lying on the White Clay creek, or Red Clay creek,

for injuries done to such land, by the unlawful acts of the company. It must, of course, be construed in reference to the subject matter of its provisions ; and will not, by any means, bear the construction put on it by the defendants' counsel, as extending to personal injuries to travellers, the loss of baggage, or injury to cattle. The law means to protect the owners of land lying on these creeks, from the consequences of any unauthorized obstruction of the creeks, and damage thereby done to the land, or other property there being. It was wholly unnecessary, and would have been idle, to extend it to any others ; for no others could by possibility be injured in the way complained of, and by the obstructions intended to be prohibited. It was the solitary case in which the legislature had authorized this company to make a close bride over a navigable stream, without providing compensation for injury to owners of land on the stream. This was done, and it was not now in the power of the legislature, perhaps it would not have been expedient if it had been, to provide such remedy. But it was eminently proper, that ample protection should be afforded against any further obstructions that were not authorized, or lawful. The company had all they needed for the use of their railroad ; the right to build a close bridge ; to close the navigation of this stream against vessels with masts ; and, to a certain extent, to obstruct the flow of water, and turn it back on the owners of land above. All this, these land owners had to submit to, without remedy ; but the legislature expressly prohibited this company from any further obstruction ; and gave to all who should be injured thereby, a summary remedy to recover damages. It would have been as idle to extend a remedy for injuries to land, to any other than the owner of the land, as it would have been, to make it operate upon any other railroad company, than these defendants, when no other company could produce the injury in the way complained of. This kind of legislation is frequent in practice : the instances of such partial laws, if these be partial, are numerous in our statutes. Almost every act of incorporation has some special law protecting the object of the corporation, and why should not individuals, liable to injury from it, be specially protected ? Ditch companies are incorporated, and their ditches guarded by special laws, with special prohibitions, penalties, and remedies ; towns are incorporated, and all persons, as well strangers, as those who dwell there, are put under special restrictions, having reference to the place, and are made liable to special penalties, and remedies. The defendants themselves, by the 20th section of their charter, have a remedy for injuries to their road,

or to any "work, edifice, or device," which they may erect, that no individual, and no other company possesses; namely, the right to recover three times the amount of actual damage sustained. They have surely no right to complain, if others are specially protected against their unlawful acts; and are empowered to recover single damages for injuries done by them. In all these instances, the remedy is necessarily confined to those who are liable to the injury; and to pronounce this act unconstitutional, on this ground, would be to declare against the validity of a very numerous class of statutes, never before questioned. If there exists any doubt on this subject, or in regard to the mode of trial, it is sufficient for me to say, that it does not present a case of that clear, palpable, violation of the constitution, that will warrant a court, having due regard to the rights of the legislature, and a proper diffidence of its own judgment in a case of conflicting opinions, to declare such a law null and void.

These are the views we entertain of the case before us. Accordinging to them, the act of assembly of 1845, is not unconstitutional; but the use to which it has been applied in this case, is not warranted by that act, and would render it, if such were the necessary construction to be placed on the law, plainly unconstitutional. I have endeavored to show that we are not driven to such a construction; but may give force and effect to that act, within reasonable limits, in perfect consistency with the constitution; and are, by no means, compelled to declare it a nullity. The result is, that the inquisition of damages returned in this case, ought to be set aside, and the plaintiff remitted to his rights, under such a construction of the act of 1845, as will not make it impair the obligation of the State's contract with the defendants, or violate the fundamental law of the land.

Houston, *Judge ad litem*.—I concur in the opinion which hast just been announced by Judge Harrington. I concur in the reasoning, as well as in the conclusion to which it has conducted him, as to the several points embraced in that opinion. I have no doubt of the power of the legislature to authorize the obstruction and diversion of the navigation and flow of the White Clay creek, without providing for the assessment of damages to the owners of lands adjacent to it, who may be incidentally injured by such obstruction or diversion. It is conceded that the navigable parts of this stream lie entirely within the limits of the State of Delaware, and I consider that the power of the legislature to authorize the obstruction of such a water course, is settled by the decision of the Supreme Court of the U. S.,

in the case of *Wilson vs. The Blackbird Creek Marsh Company*, (2 Pet. Rep. 251.) The legislature having the power to authorize the obstruction of the navigation and flow of this creek without awarding damages to the owners of lands lying upon its borders, for consequential injuries resulting from it, and having authorized this company to obstruct the same in the mode prescribed by its charter and the supplement thereto, passed in 1837, without providing compensation for injuries of this nature, the company, in my opinion, has violated no private right, and was not liable to be sued for any such injury, provided it has erected and maintained the obstruction pursuant to the authority conferred upon it by the legislature. A consequential injury resulting from such a legal and authorized obstruction, is in the language of the books *damnum absque injuria*, which implies not only a loss without a remedy, but imports, in contemplation of law, a fictitious damage, which constitutes no cause of action whatever. If then the bridge was constructed and repaired by the company, in conformity with the provisions of its charter as originally granted and amended, the plaintiff in judgment of law, had no cause to complain of the obstruction, and had no right of action for any consequential injury resulting from it. This principle I conceive to be well established upon the authority and reasoning of *Lansing vs. Smith and others*, (8 Cowen 146,) and *Hollister vs. The Union Company*, (9 Conn. Rep. 436.)

But the counsel for the plaintiff has contended, that inasmuch as the legislature provided in the act incorporating the defendants, that the road should be constructed with the least possible injury to private property, they have transcended their authority and violated the terms of their charter, in erecting the bridge over White Clay creek, transversely across the current of the stream, and in constructing the embankments on either side of it, without culverts to vent the water from above in the event of an inundation. But without stopping to determine the probable meaning of this general and indefinite provision, whether it includes remote and consequential injuries, or refers only to such as should be direct and immediate, it is sufficient to remark, that when the legislature comes to provide in a subsequent section of the charter, for the erection of bridges over this and other streams necessary to be crossed in the line of the projected improvement, it imposes no such restrictions upon the company. On the contrary, when it proceeds to define with more certainty and precision, its meaning as to the mode of erecting the bridge over the White Clay creek, it simply requires in the first in-

stance, that it should be built with a draw, without prescribing at what angle it should cross the stream, or how the embankments should be constructed. This view is also confirmed by the law of 1837, which authorized the conversion of this drawbridge into a permanent bridge; for in this act the legislature seems to have recognized that the bridge was originally constructed in conformity with the charter of the company, since it requires, in case of its destruction, that it shall be rebuilt at the same place, of the same dimensions, and of the same width between the piers as the bridge first erected. Were this then the only point in the case, I should be clearly of opinion, that the act of 1845 infringes the rights and powers conferred upon the defendants, and would consequently be null and void. The legislature having the power, as I have already shown, to authorize the erection of this bridge over the White Clay creek, without providing compensation for consequential injuries resulting from it, and having seen proper to confer that authority upon the defendants without any such restrictions and conditions, it could not by a subsequent act make the company liable against its consent, for any such injury, without impairing the obligation of the contract implied in the charter between the State and the corporators. It is admitted by the counsel for the plaintiff, that a legislative grant, or charter, is a contract within the meaning of the tenth section of the first article of the Constitution of the United States, and the point is too well settled at this day to be successfully controverted. It is equally settled, that the imposing of new conditions and restrictions, inconsistent with the terms of the original grant or charter, without the consent of the grantee, impairs the obligation of the contract. This the legislature cannot do without violating one of the wisest and most salutary prohibitions contained in the Federal Constitution. So far then as the act of 1845 purports to give redress to Samuel Bailey and others, for consequential injuries resulting from the legal and authorized acts of the company, I am of opinion it is unconstitutional and void, and not binding upon the defendants, as they have never assented to or accepted it.

But it is admitted in the case stated, that the bridge which was partially destroyed, and rebuilt in 1839, was not rebuilt in exact conformity with the act of 1837. It is conceded that the piers of the bridge, as they now stand, and have stood since that time, occupy four feet more of the stream than they occupied in 1837, and when the bridge was originally constructed. This contraction of the space between the piers in 1839, was an act unauthorized by the legisla-

ture; for, whatever may have been the original power of the company over this matter, they saw fit in 1837, to accept a supplement to their charter, prescribing the precise place and manner in which the bridge should be rebuilt, in the event of its destruction; and in accepting that supplement, they must be held to have assented to all the restrictions and limitations which it imposes upon them. One of these restrictions is, that in case the bridge shall be destroyed, it shall be rebuilt with the same width between the piers, as the bridge first erected. This restriction, it seems, was directly violated by the defendants in repairing the bridge in 1839, and if Samuel Bailey has sustained any consequential injury, peculiar and personal to himself, by reason of this contraction in the space between the piers, in my opinion, it was competent for the legislature in 1845, to provide a remedy for such an existing injury, or for any future injury of the same description resulting from this unauthorized and illegal obstruction. The injury, however, must be peculiar and personal to himself, and not such as has been sustained by him, in common with other citizens of the State, whose privilege of using and navigating the creek, has been abridged or impaired by reason of this contraction. Such an invasion of a general right, or common privilege, without authority of law, would constitute a public wrong, and not a personal injury; and would be punishable only by indictment, and not by a private action at the suit of any individual. So far, therefore, as the act of 1845 was intended to embrace, or may be legally construed to embrace, any peculiar injury which has heretofore resulted, or may hereafter result to the plaintiff personally, from this unauthorized obstruction of the stream, I think it is constitutional and binding upon the company; and that we are bound to give it such a construction. For such an injury, if any such has happened to the plaintiff, he had a complete and subsisting right of action from the moment the injury occurred, and whether the cause of action was barred or not at the time the act of 1845 was passed, I apprehend is not material, as, viewed in this aspect; it is an act operating upon the remedy only, and not upon the right of the plaintiff. It is not in the power of the legislature to create a cause of action by retrospective legislation; that is to say, it is not in its power to make that which was lawful when done, unlawful after it is done. But where the act was originally unlawful, and the cause of action has accrued, the legislature may, I apprehend, control the remedy, and extend as well as limit the time for prosecuting the suit. Contemplated in this light, the act of 1845 does not affect or impair the obligation of any con-

tract between the State and the defendants; or seek to deprive them of any right vested in them, or to supply the plaintiff with a right of action where none before existed. It is upon the ground that they act merely upon the remedy, and not upon the obligation of the contract, that the constitutionality of acts of limitation has been vindicated and established. I am no apologist for retro-active legislation; and I admire the provision, to be found in some of the State constitutions, which prohibits the passage of retrospective laws generally. As a legislator, I should be exceedingly reluctant to exercise the power in any instance, except where it had for its object the quieting of just and equitable titles, and terminating law suits, instead of opening a door to increased litigation. But when called upon in my present capacity, to decide upon the authority of the legislature to pass such a law operating upon the remedy merely, I am not at liberty to consult the policy of the act; and as I can find nothing either in the Federal or State constitution which prohibits it, I am bound to hold, that the legislature possesses that power. The legislature of this State, as well as of every other State in the Union, I believe, has passed laws for quieting titles, and confirming defective sales and conveyances, which certainly go much further towards divesting vested rights, than any thing to be found in the act now under consideration; and the power of the legislature to pass such retrospective laws, has been adjudged upon argument to be constitutional, on the ground that they affect and relate to, the remedy only. In *Kent's Com.* 455, the law on this point, is very clearly, and, I apprehend, correctly stated. The learned commentator remarks, that "a retrospective statute, affecting and changing vested rights, is very generally considered in this country, as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations." I have already shown that with this construction given to the law in question, which confines it in its operation to peculiar and special injuries, resulting from the unauthorized contraction of the space between the piers of the bridge in 1839, it impairs no contract between the State and the corporators; and it is equally certain, it disturbs no vested right of the company; since it can claim exemption from liability for such injuries, only upon the plea of the statute

of limitation, which is purely remedial in its nature, and may be repealed at the will of the legislature. No person can ever acquire a vested right through a wrongful act, and by means of the statute of limitation, which will put it beyond the reach and control of the law-making power to change or alter it.

If then the act of 1845 be susceptible of such a construction as will reconcile it, either in whole or in part with the constitution, are we not bound to give it such a construction? I think we are upon the principle of *magis valeat quam pereat*, which applies in the construction of all statutes, as well as upon the authority of all the adjudged cases, which are numerous upon this point. A proper respect for the dignity of the legislature also requires that we should incline in favor of the validity of the act, unless it be clearly and unequivocally void. On this point we have in addition to the numerous authorities which have been cited on the part of the plaintiff, a decision of our own court to guide and direct us. In *Jones vs. Wootten*, (1 Harr. 77,) the court held, that where a statute is susceptible of two constructions, one of which will bring it in conflict, and the other harmonize it with the constitution, we are bound to give it the latter construction. But while I cordially subscribe to this doctrine, I have no doubt whatever of the power and authority of the court to declare an act of the legislature to be inoperative and void, where it clearly conflicts with the principles and provisions of our State constitution in any article, clause, or section of it. Ours is a government of limited powers, with co-ordinate departments, neither of which can be called supreme when compared with the others. The judicial department is just as supreme in the exercise of its legitimate authority, as the legislative department. Each has its appropriate duties assigned it by the constitution; and, both must act in subordination to all of its provisions, and are sworn to support and maintain it, when entering upon the discharge of their respective functions. It is the business of the legislature to make law; it is the province of the court to expound and administer it; and in administering the law, it is as much bound to observe its oath to support the constitution as the legislature is in making it; a breach of the constitution by the one, would not justify or excuse a breach of the constitution by the other; for they must both act upon their own judgment and upon their own responsibility, independently of each other. In expounding the laws of the State, the court is as much bound to expound them with reference to the constitution, as with reference to each other; for the constitution is a part of the law of

the State; and, as it is the supreme law, and the parent and arbiter of all the rest, the court must, of course, acknowledge its supremacy, and declare every act void, so far as it clearly conflicts with any one of its provisions. By the 1st sec. of the 6th art. of the amended constitution, it is provided that "the judicial power of this State shall be vested" in the several courts therein enumerated and provided for. Now what is the judicial power of this State? Certainly in it must be included the right and authority of the judges, to determine and decide every question of law, necessarily arising in the progress of a trial, of which the court has jurisdiction from the nature of the cause of action; for this is strictly and peculiarly a "judicial power." Every question of law, thus arising, is to be decided by the court, for that is the purpose for which it is created; while questions of fact are usually to be referred to a jury. Whenever, therefore, in the progress of a trial, a question arises as to the constitutionality of an act of the legislature, applying to the subject matter of the suit, it is a question of law, to be decided by the court having jurisdiction of the case; for the whole judicial power of the State over the suit, is by the express words of the constitution, delegated to the court having the jurisdiction of it. The object of a written constitution, is in the first place, to establish a government; and, in the next place, to define and circumscribe its powers, so as to preserve the harmony of its parts, and to prevent encroachments upon the rights reserved to the people. No one will contend, I presume, that if the legislature should pass an unconstitutional act, the people of the State would be bound to obey it; and yet, if the power does not reside in the courts to pronounce it void, as it would be, it is difficult to conceive how the people could resist the wrong and re-assert the majesty of the constitution, without a resort to physical force, in case the legislature should refuse to repeal it. A convention would not necessarily cure the evil, since the defect would not be in the constitution, but in a power professing to act in obedience to it. Such a construction and assumption would subject the whole fabric of the government, constitution and all, to the authority and control of the legislature; and would leave the people without any immediate and legal redress against its usurpations of power. Did the men who framed, and the people who have assented to the constitution, intend this? And did they not, by vesting the judicial power of the State in the courts established under it, which are the rightful interpreters of the constitution as well as the laws, mean to erect a peaceful and ever open tribunal for the redress of such abuses

whenever they may occur? Courts of justice are established to administer the laws; and I have already shown that whenever a dispute arises as to the constitutionality of a law in the administration of it, it is a judicial question, to be decided by the court; and yet, if the court has not the power as is contended, to pass upon this question, let us see into what an awkward position, not to say, absurdity, it would lead us. By the 17th section of the second article of the constitution of this State, it is provided, that "no act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two-thirds of each branch of the legislature," &c. Suppose, for the sake of argument, the legislature were to pass an act of incorporation by less than a concurrence of two-thirds of each branch, say by a bare majority of both houses; and this fact should appear upon the journals. Suppose they were to order this act to be engrossed; to be signed by the speakers; and the same should be published as an authoritative act of the legislature. Suppose further, the persons obtaining this act were to proceed to organize a company under it; and should afterwards come into one of the courts of the State by their corporate name, to enforce the pretended rights conferred upon it; would any lawyer, or any man, contend that the court would be bound to recognize it as a lawful body politic, and thus lend its sanction to a flagrant and palpable violation of the constitution? Suppose the only fact put in issue by the pleadings in such a suit, should be the legal existence of the corporation. This would be a question of law, to be determined by the court on an inspection of the journals, and by referring the matter to the constitution. Would the court be bound in a such a case, to shut its eyes to both, out of a feeling of blind and insane deference for an imaginary superiority of the legislative department, and overrule a plea sustained by the supreme and fundamental law of the State, and the formal record of the legislature? Such a question scarcely requires to be answered; for it is perfectly evident that no court which had a particle of respect for the constitution, or a single sentiment of regard for its own character, could ever consent to prostitute its powers, to give force and effect to such an absolute nullity of the legislature. To do this, the court and not the legislature, would have to make it a law. No law can execute itself; and as it came void from the hands of the legislature, it is manifest that the court would have to give it all the legal vitality which it possessed, by executing and enforcing it; and this would make it, in effect, rather the creature of the court, than of the legisla-

ture. But it is unnecessary to argue this question; for, independent of the reason and necessity of the principle, it is too well settled by the whole weight and current of authorities in its favor, to be seriously disputed.

I do not consider the act in question objectionable on the ground relied upon in the argument, that it is an act of incorporation enacted by less than a concurrence of two-thirds of both branches of the legislature. What constitutes an act of incorporation within the meaning of this clause in the constitution, has long been a quere among gentlemen of the legal profession; but certainly it is not every amendment or supplement to the charter of a company, which will amount to an act of incorporation. Unless the act confers additional rights and franchises of a corporate nature; or confirms rights already existing in the company, there seems to be no reason for calling it an act of incorporation. What will constitute an act of incorporation, must depend, I apprehend, in every instance, upon the nature and quality of the act in question. But be this as it may, it is certain that the mere title of a law, can never make it an act of incorporation, for the simple reason, that the title is no part of the act, and has nothing to do with the interpretation or construction of it. Now strip the law of 1845 of its title, and who would ever think of calling it an act of incorporation? It has none of the qualities or characteristic features of such a law. It does not pretend to incorporate those whom it enables to sue; and so far as it relates to the defendants, it is in the broad construction contended for by the plaintiff, rather an act to unmake than to make a corporation.

Nor do I consider the act objectionable on the ground that it is partial in its application, and affords a remedy, and mode of trial, unwarranted by the constitution, and the genius and spirit of our municipal regulations. It is not necessary that a law should be general, in order to be constitutional. Many of the laws which are passed at every session of the legislature, must from the very necessity of the case, be local and partial in their nature; and, to deny the legislature the right to pass such laws, would be to deprive it of one of its most useful powers of legislation at the present day. Besides, it is difficult to perceive how the defendants can contend for such a restriction, without invalidating their own charter; since an act to authorize them to erect a bridge over the White Clay creek, and to maintain suits for trespasses against it, is just as partial in its character, as an act to authorize those who live upon the banks of the stream, and have been aggrieved by the improper construction of

the work, to maintain suits for injuries resulting from it. As to the last mentioned objection I have only to add, that the nature of the remedy, and the mode of trial, though somewhat novel in its application in the present instance, is not unknown to the laws and constitution of this State. The writ in the nature of a writ of ad quod damnum, has existed and been in use among us from an early period in our colonial government down to the present time. It has always been a remedy of special legislative grant, and seems to have been a favorite process with the legislature when about to authorize adverse proceedings against the property or possession of others. The legislature was in the habit of conferring it anterior to the adoption of the original and amended constitutions; and, as there is no restriction to be found in either instrument against it, we are bound to presume that the provision that "trial by jury shall be as heretofore," approves and justifies it. It was conferred upon the defendants by a provision of their charter, and upon the constitutional validity of it, depends their title to all the lands which they have found it necessary to condemn for the use of the company in this State.

Such are the conclusions to which I have arrived in relation to the several points of law which have been presented, and ably discussed, in the argument of this case. I think the law of 1845, in the broad sense contended for by the counsel for the plaintiff, is unconstitutional; in the limited construction and application which I have given it, I think it is not. If the plaintiff has sustained any peculiar and special injury in consequence of the contraction of the space between the piers of the bridge in 1839, I am of opinion that was a proper ground for the assessment of damages by the jury; but whether he has or has not, does not appear to the court. Neither the inquisition, nor the testimony taken upon it, shows this fact. Besides, it appears from the evidence accompanying the return, that the damages awarded to the plaintiff, were chiefly, if not solely, allowed for losses of which the plaintiff could not constitutionally complain; and, for these reasons, I am of opinion that the writ and the proceedings upon it should be set aside.

Layton, for plaintiff.

Frame and Wales, for defendants.

THOMAS ROBINSON'S EX'RS. P. B., PLAINTIFFS IN ERROR VS. HETTY ROBINSON.

A legacy bequeathed to the defendant, cannot be set-off to an action by the executor, though he has assets to pay the legacy.

WRIT OF ERROR TO THE SUPERIOR COURT IN AND FOR SUSSEX COUNTY.
HEARD AT THE JUNE TERM, 1846, BEFORE JOHNS, JR., CHANCELLOR; AND JUDGES BOOTH AND HAZZARD.

The action below was in assumpsit by the executors of T. Robinson, for goods sold and delivered, and money had and received; to which there was a plea of set-off of a legacy bequeathed to the defendant by said Robinson.

The defendant, by arrangement with the executors, took certain goods at the appraisement, and bought other property at a sale made by them; and there was some evidence of their consent, that the amount of the goods so bought, should be deducted from the legacy.

The court below charged that the plea of set-off of the legacy bequeathed by plaintiff's testator to the defendant, was a good plea, not merely on the proof of an agreement by the executors to deduct the bill of goods bought by defendant of them out of said legacy, but on the principles of set-off, generally: the legacy being a debt due (under the act of assembly) from the executors, and recoverable in assumpsit.

Exception was taken to this part of the charge; and the case now came up, in error, and was argued by Layton, for plaintiffs in error, and Cullen, for defendant.

Mr. Layton, cited *Dig.* 111; 8 *Bac. Ab.* 639-49; 2 *Wms. Ex'rs.* 1333, 651; 10 *Serg. & R.* 10; 8 *Ibid.* 124; 4 *N. Y. Dig.* 956, 2 *Johns. Rep.* 151; 8 *Wend. Rep.* 530; 1 *Tidd's Pr.* 605; 9 *Cow. Rep.* 295; 6 *Law Lib.* 28; 2 *Hill's Rep.* 210.

Mr. Cullen, contra, cited *Dig.* 228; 2 *Wms. Ex'rs.* 1388, 934; *Ward on Leg.* 143; 4 *Harr. Rep.* 173; 3 *Johns. Rep.* 433; 11 *Ibid.* 70; *Dig.* 445; 1 *Wend. Rep.* 418; 21 *Ibid.* 554; 4 *Coven.* 34.

JOHNS, JR., CHANCELLOR.—In this cause the plaintiffs in error have relied on errors assigned in eight several, distinct, and specific matters, as entitling them to a reversal of the judgment below. Independent of the bill of exceptions, and the matter therein contained, it is apparent the record exhibits no error, for the pleadings raise no question of law, and the facts in issue are referred to the jury; and

their verdict being found for the defendant, would sanction the judgment. But the second and eighth causes assign as error, the opinion and charge of the court relative to the law of set-off; and plaintiffs therefore, insist upon their right to a reversal of the judgment, for this cause.

This right is founded upon the act of assembly, concerning bills of exceptions, cases stated, and verdicts. (*Dig. Del. Laws*, 445-6.) The exception is to that part of the opinion and charge of the court to the jury, which declared, "on the principles of set-off, generally, that the legacy of one thousand dollars ought to be set-off against the demand of the plaintiffs." This part of the opinion and charge of the court, is considered by this court, erroneous; the cause of action being for property sold by the executors, and part of the assets of the testator. Their right to collect by suit, their value when sold, cannot be varied or affected by the form of action, whether suing as executors, or in their own name, makes no difference. In such an action, a legatee cannot set-off a legacy, for it would interfere with the course of administration. Nor when an executor sues for a cause of action arising after the testator's death, can the defendant set-off a debt due to him from the testator. (*Shipman vs. Thompson*, T. T., 11 & 12 Geo. 2; and *Tegetmeyer and another, Ex'rs. vs. Lumley*, T. 25, Geo. 3, B. R.) The latter was an action of covenant for rent, part of which became due in testator's life time, and part since his death. The defendant, at the trial before Lord Mansfield, at the sittings after *Easter Term*, 25 Geo. 3, set-off a debt due from the testator to him, and the plaintiffs were nonsuited. Erskine moved for a new trial, on the ground that this could not be set-off; and cited *Rydout, assignee vs. Brough, Coup.* 133; *Shipman vs. Thompson*, Bull. N. P. 180; and *Kilvington Ex'rs. vs. Stevenson*, which he read from a note of Mr. Justice Yates. "Assumpsit as executor for goods of his testator. There were two pleas, 1st, non-assumpsit; 2d, a set-off for a debt due from the testator to the defendant. To this the plaintiff demurred; and Wallace, in support of the demurrer, insisted that the plea was bad, and that the defendant could not set-off a debt owing to him by the testator, in satisfaction of the present demand, as that would be altering the course of distribution; and he might by this means be paid before creditors of a superior nature. *Per Curiam*.—The plea is clearly bad. This is not an action for goods that were in hand at the testator's death, in which case he might set-off; but for goods he has taken possession of since his death, in which case, to allow the set-off, would be alter-

ing the course of distribution. Judgment for plaintiff." (*Montague on Set-off*, 41 App'x.)

It is therefore, considered by the court, that for the error in that part of the opinion and charge of the Superior Court, which states, "that on the principles of set-off, generally, the legacy of one thousand dollars ought to be set-off against the demand of the plaintiff;" the said judgment be, and the same is hereby reversed, and the record remanded to the Superior Court of the State of Delaware, in and for Sussex county. The costs of this appeal to be paid by the defendant.

Judge Hazzard, concurred.

The Chief Justice, dissented.

Booth, Chief Justice.—With much deference, I entirely dissent from the opinion expressed by a majority of the members of this court. It appears to me, that the judgment of the Superior Court ought to be affirmed on two distinct grounds; either of which is sufficient for that purpose, independently of the other. 1st. The legacy of one thousand dollars is a legal set-off in this action, against the demand of the plaintiffs, upon the principles of the law of set-off, generally. 2d. Supposing it is not, it is a proper subject of set-off under the agreement of the parties. And, 3d. Supposing neither of these grounds to be tenable, it may be well questioned, whether it is competent to the plaintiffs, under the circumstances of this case, to avail themselves of the objection in a court of error.

1st. By the statutes which allow a set-off of mutual cross demands unconnected with each other, and by our own act of assembly on the same subject, the debt or demand sought to be recovered, and that intended to be set-off, must be *mutual*, and due to each party respectively, in the *same right or character*. Therefore, where an executor sues for a cause of action arising after the death of his testator, as for goods sold and delivered by the executor, or for money had and received to his use, whether he does or does not declare in his representative character; the defendant cannot set-off a debt due to himself from the testator; because the debts are not mutual, or due in the same right. (*Shipman vs. Thompson, Willes Rep.* 103; *Kilvington vs. Stevenson, Willes Rep.* 264, n.)

But a demand against the executor, which accrued after the death of the testator, and for which the defendant might maintain an action against the executor, and declare against him, either in his representative or individual character, may be set-off against the demand of the executor, arising after the death of the testator; be-

cause in this case, the demands *are* mutual and due in the same right. The claim sued for, and the legacy set-off, in the present action, are of this character. They are mutual demands. Although the weight of authority sustains the position, that a suit for a legacy cannot be maintained in a court of law; yet, by an act of assembly of this State, (*Dig.* 228,) "an action of assumpsit may be maintained against an executor for a legacy." The act declares, that "assetts in his hands to pay a legacy, shall create a legal liability, and raise a consequent promise to pay it. In case there be not assetts to pay the whole legacy, a part may be recovered." To maintain the action, it must be proved, that the executor has assetts in his hands to pay the legacy, or a part of it; and he may be declared against in his own right, or as executor. In the present case, it is shown by the bill of exceptions, that the plaintiffs have assets for the payment of the defendant's legacy. Their assent to the legacy is evidence of that fact, which is nowhere controverted by them. But the fact of the testator having left a large personal estate which came to their hands; their acknowledgment that they owed the defendant her legacy; and their agreement that she might take at the appraisement, and purchase at the vendue, any articles of personal property she pleased, to the amount of her legacy of one thousand dollars, are conclusive evidence of their having assetts to pay it. The fact of their having assetts for that purpose, the act of assembly declares, shall create a legal liability, and raise a promise to pay the legacy consequent on such liability. The legacy then is not a demand against the testator, although connected with his estate; but is a demand against the plaintiffs, for which they are responsible in their private capacity; although they would be described as executors, in the plea of set-off, if drawn out in legal form. Their claim against the defendant, for goods sold and delivered, and for money had and received, although they declare as executors, is not for a debt due to the testator; but due to them, upon a cause of action arising since the testator's death. It follows, that the demand sued for, and the legacy due to the defendant, are mutual debts, and due to the respective parties in the same right. Therefore, upon the principles of set-off, generally, the legacy is clearly a legal set-off in this action, against the demand of the plaintiffs.

2dly. But, independently of this view of the case, the plaintiffs, by their agreement, were bound to allow the legacy as a set-off, and the defendant had a right to insist upon it. The bill of exceptions states, and it was proved at the trial, that the plaintiffs admitted they owed

the defendant the amount of her legacy; and had agreed, that whatever goods she might take at the appraisement, or purchase at the vendue of the testator's personal property, should be deducted from the legacy.

A demand which cannot be allowed as a set-off under the rules of law, may be admitted under a previous agreement of the parties to that effect. For example; if the parties have agreed that separate debts may be set-off against a joint demand; or joints debts against separate demands; such debts may be set-off against each other, although under the statutes of set-off they would not be allowed. See Kinnerly and others, assignees of Brymer vs. Hossack, (2 *Taunt.* 170,) where under an agreement between the parties, separate debts were set-off against a joint demand.

3dly. The objection of the plaintiffs ought to have been taken at a proper time, in the court below. On principle, it would seem to be too late now to avail themselves of it in a court of error. Although under our practice of pleading, merely a memorandum or minute of a special plea is entered, the defendant ought to suggest briefly on the record, the particular matter relied on, and intended to be given in evidence under the plea. If he does not, the plaintiff may, for that cause demur specially; and thus compel him to make the suggestion. In either case, whether the plea be drawn up formally, or the suggestion be made on the record; if the matter relied on, is insufficient in law to maintain the defence, a general demurrer should be entered. In the case under consideration, the plea of *set-off* was entered merely by way of memorandum. The plaintiffs might have required it to be drawn up in form; or the particular demand constituting the set-off to be suggested on the record; and then put in a general demurrer, on the ground that the legacy did not constitute a legal set-off: or having taken issue to the plea as entered, in short, they ought to have objected at the trial, to the legacy being given in evidence. Having permitted it to go to the jury under the issue joined on the plea of set-off, it is too late afterwards to make the objection. The plaintiffs could not have availed themselves of it, on a motion to set aside the verdict; and ought not now to be permitted to make the objection in a court of error. (*Sherman vs. Crosby*, 11 *Johns. Rep.* 70; *Wilson vs. Larmouth*, 3 *Johns. Rep.* 432, 433.) By their neglect in the court below, they now have all the advantages of a general demurrer to the plea of set-off; of a demurrer to the defendant's evidence under that plea; and of a bill of exceptions. Although "a majority of this court is of the opinion, that a legacy is

not a legal set-off;" yet, the judgment of the Superior Court ought to be affirmed, on the ground that the plaintiffs agreed to allow the legacy as a set-off; a fact which is stated in the bill of exceptions, and cannot, therefore, be disputed. The reversal of the judgment, and sending the cause to the court below, to be again tried; is of no benefit to either party; because the verdict must result in favor of the defendant, under the plaintiffs' agreement to allow the legacy as a set-off.

Judgment reversed.

Layton, for plaintiffs.

Cullen, for defendant.

SUPERIOR COURT.

FALL SESSIONS,

1846.

BENJAMIN BURTON, guardian of MARTHA D. BURTON *vs.*
GEORGE TUNNELL and sureties.

If an administrator become guardian to a minor interested in the estate, he must do some act transferring the assetts in his hands, as administrator, in order to charge himself and sureties under the guardian bond.

The passing a guardian account is sufficient.

Quere. If the neglect to pass such an account would not charge him under a breach for neglect of duty, in case the administration security fails?

THIS was an action on a guardian bond against principal and sureties.

The defendant, George Tunnell, was administrator of Miers Burton, the father of Martha Burton, and passed sundry administration accounts showing balances in his hands, and distributing the same among the heirs, including this plaintiff. He afterwards became the guardian of Martha Burton, the plaintiff, and gave bond with the other defendants, his sureties. He never passed any guardian account; but was removed, and Ben. Burton appointed in his place.

This suit was brought against him as former guardian, to recover the balance so distributed to the plaintiff, as her share of her father's estate.

Cullen moved a nonsuit.

By the Court.—This question was decided in the old Court of Errors and Appeals. (*State use Owens vs. Luff, M. S.*; 5 *Mason Rep.* 95; *Pratt vs. Northam*, 1 *Kinne Comp.* 388; 1 *Dana's Rep.* 514; 4 *Mason Rep.* 131, *Taylor vs. De Blois*.) In order to charge the guardian and his sureties, for money which comes into his hands as administrator, he must do some act signifying his purpose to change the fund into the guardianship; such as passing an account charging himself as guardian. Or, without such actual change of

of the fund, if by his neglect to do so, which in his case, would be equivalent to neglecting to collect a debt due from another, the money should be lost by the insolvency of sureties in the administration bond, a breach of the condition of the guardian bond founded on this neglect, might, perhaps, warrant a recovery. But in the present case, the single breach is, that the money being in defendant's hands as guardian, he did not pay, &c. We think he cannot recover on this breach. If he were, it would not prevent a recovery again on the administration bond. There cannot be a doubt, that if this action were on the administration bond, the plaintiff would recover on the proof now offered; for it shows an admission of the money in defendant's hands in that character.

Judgment of nonsuit.

Houston and McFee, for plaintiffs.

Cullen, for defendants.



EBE TYRE vs. LEVIN CAUSEY.

A mere affirmation of the soundness of a horse, at the time of sale, is not a warranty, unless so intended.

But, if it be wilfully false, it is actionable; and the remedy is in *case for deceit*.

A warranty enters into the contract, and the remedy is either in *assumpsit* or *case*. Where there is a warranty, it matters not whether the seller knew his statement to be untrue, or not.

In *case* for deceit, a count in trover may be added.

This was an action on the *case for deceit* and false representation in the exchange of horses; with a count in trover for a pair of oxen.

As a part of the defence, it was proposed to prove that the plaintiff was a skilful judge of horses; on the ground, that, as the action was for deceit and imposition, it was important to know whether Tyre was a man likely to be imposed upon; to which it was replied, that as the gist of the action was the falsehood of defendant's representations, it was no matter whether the party to whom the warranty was made was skilful or otherwise. The court overruled the question.

Cullen and Saulsbury, for defendant.—The action is in *case for deceit*; not in *assumpsit* on the warranty. In the latter action, if the warranty enter into the contract the plaintiff will recover on proof of the warranty, whether the defendant *knew* the defect or not. Not

so in the action of deceit. There the plaintiff must prove the *scienter*; that the defendant knew the defect, and intended to cheat plaintiff by the false representation. In either form of action plaintiff must prove the unsoundness, or that the representations were not true; which is not proved here. Defects open to view are not within the warranty. (*Ross on Vend.* 174, 338; *2 Steph. N. P.* 1285.)

Neither will trover lie as on a rescinding the contract; for the property in the horse is changed by the exchange. (*2 Steph. N. P.* 1296-7.) The first count affirms the contract, and seeks damages on account of it; the second seeks to disaffirm the contract, and recover back the oxen. These are improperly joined.

Layton, for plaintiff.—Whatever the vendor represents at the time of sale is a warranty. (*2 Steph. N. P.* 1289; *3 Stark. Ev.* 1261.)

As to the joinder of the count in trover, with case for the deceit, it is proper; (*1 Ch. Pl.* 201;) and, if it were defective, objection cannot be taken now.

By the Court.—A mere assertion by the seller that a horse is sound, is not a warranty, unless intended as such. (*3 Stark. Ev.* 1661, n.;) and the only remedy for such misrepresentation is in case for the deceit; where it must be proved that the seller knew of the falsehood of his statement, and intended to deceive. (*2 Steph. N. P.* 1286; *3 Stark. Ev.* 1660; *1 Wh. Selw.* 647.)

A mere affirmation is a warranty, if so intended; in which case, or where there is an express warranty, it enters into the contract; and the best action is assumpsit for breach of the contract, though case for breach of warranty will still lie. (*2 East's Rep.* 446.) And where the action is for a breach of warranty, whether its form be assumpsit or case, it matters not whether the seller knew his statement to be untrue or not.

Where the action is case for deceit, a count in trover may be added. (*3 Chit. Plead.* 390.)

Verdict for plaintiff.

Layton, for plaintiff.

Cullen and Saulsbury, for defendant.

SALLY BETTS, widow *vs.* HEZEKIAH MATTHEWS.

A suit of dower *abates* by the death of the defendant, and cannot be prosecuted even for *damages* for detention of dower.

SUMMONS in dower. Death of plaintiff suggested, and her administrator made a party; who prosecuted the suit for arrears.

Layton, for defendant, contended that the suit was abated by the death of the widow; not only as to dower, but as to arrears. By the death of a party, no suit where the cause of action survives, shall abate, &c. (*Const., art. 6, § 18.*) Actions of tort are not within this saving, but fall under the common law principle, *actio personalis moritur, &c.* (*Parke on Dower* 308-9; 1 *Cruise's Dig.* 17; *Tit. Dower, ch. 4, § 41;* 1 *Lev.* 38; 1 *Salk. Rep.* 252; 1 *Show. Rep.* 97, S. C.; 3 *Mod.* 282; 3 *Lev.* 275, S. C.)

The action of dower sounds in damages; it is for a tort; *ex delicto*, not *ex contractu*; goes for damages for wrongful detention. If the tenant die, pending the action for dower, the action abates; if the defendant die, pending action, the suit cannot proceed; and, even after judgment for dower, if she die, no remedy survives for the damages. Damages are no duty until assessed. (3 *Mod.* 282; 2 *Brown Ch. Cases* 629-32.)

Houston.—Damages for arrears of dower are recoverable only under the statute of Merton, which gives the action of *scire facias* for damages, after recovery of dower. Our own act, *Dig.* 164, gives damages for detention of dower, "in satisfaction of any demand on account of rents and profits," treating this as a debt, and indeed, a favored demand in law. I see not why it should abate.

Wootton.—The right to damages for arrears of dower, is given by our act as expressly in the name and character of damages, as by the statute of Merton. It is a remedy for a tort sounding in damages, and as distinctly apart from any contract, as any other personal action which dies with the person. This is not a suit for rent, but for *damages* for a wrongful detention of dower.

By the Court.—This is a real action. It is a demand of the land; and the damages are a mere accident given by the act of assembly. It is not even a mixed action. It is purely a claim for the land. The damages for detention can in no case be recovered without recovery of the dower; and as this is impossible after the death of the dowress, the damages fall with her death. *Nonsuit granted.*

Houston, for plaintiff.

Wootton and *Layton*, for defendant.

ELIAS MORRIS *vs.* JONES & SPENCE, partners.

One partner cannot bind the firm by deed, without special authority.

If a partner executes a single bill in the name of the firm, it binds himself alone.

The obligee cannot recover against the firm on the *deed*, for it is the deed only of the party sealing it; nor upon the simple contract, for that is merged in the deed.

THIS was an action of debt on a sealed instrument, executed by John Spence, in the name of Jones & Spence, for money borrowed by the firm. The declaration was special on the instrument, and the common money counts were added.

Cullen, for defendant, contended that as the money was lent to Spence on the security of his note under seal, this merged the simple contract; and bound him, though it did not bind the firm. One partner cannot bind another, under seal, without proof of authority. (1 *Wend. Rep.* 326; 2 *Harr. Rep.* 147.) A note extinguishes the remedy on the simple contract. The only remedy is on the security taken. (1 *Kinne Comp.* 99; *Chit. Cont.* 782; 3 *East* 257; 10 *Com. Law Rep.* 54; 2 *Johns. Rep.* 213; *Story Part.* 525, 237, 238, 176; *Colly.* 262; 1 *Wend. Rep.* 326.)

Layton.—We have proved a loan of \$100 by plaintiff to Jones & Spence, and that Spence executed a sealed instrument in the partnership name. This did not bind the firm; and did not merge the simple contract remedy against Jones & Spence. The declaration is both on the note, and in general assumpsit. If a party declare on a special agreement, and fail to prove it, he may recover on the common counts. (*Ros. Ev.* 175.)

The first count is on a single bill under seal, by Jones & Spence, which we have failed to prove, as it is only the deed of Spence. We fall back then on the common counts to recover the consideration of the note. (*Ros. Ev.* 175; 1 *East* 55; 1 *Ch. Pl.* 200.)

The Court charged,—1st. That the plaintiff could not recover on the special count on the single bill of Jones & Spence, because the bill being under seal was obligatory on Spence alone, and was not the deed of Jones; as Spence had no authority to bind his partner by such an instrument. 2d. That he could not recover on the count for money lent, because the taking the single bill of Spence for the money so lent, extinguished the remedy on the simple contract against the partners; and the plaintiff's remedy was against Spence alone on the bill. Whereupon the plaintiff suffered a nonsuit.

Layton, for plaintiff.

Cullen, for defendant.

FARMERS' BANK vs. WILLIAM D. WAPLES' EX'R.

The indorser of a negotiable instrument may waive notice of its dishonor, before maturity.

THIS was an action by the bank against an indorser, on a note drawn by Jacob Forsett, payable to Wm. D. Waples, or order; and indorsed by him to plaintiffs.

It was proved that the indorser specially requested the bank not to protest this note, and expressly waived notice, saying he would always renew his indorsement, and hold himself liable without protest or notice. It was in consequence of this request, that the note was not protested. The drawer had no funds in bank at the time the note fell due, nor at any other time. The note had been renewed several times with the indorsement of Wm. D. Waples. It was allowed to run over several times, in consequence of this request of Waples, and he afterwards renewed his indorsement; at the last maturity he was sick, and had since died. There was no presentation of the note, or notice, on the day of payment.

The defendant moved a nonsuit, for want of protest and notice.

Bayard, jr., and Houston.—The obligation of an indorser is conditional, viz: that if the drawer shall not meet the note at maturity, the indorser will do it for him, upon notice of the failure. The attempt is to prove an antecedent agreement of Col. Waples, that he would pay the note, with or without notice of dishonor; which is a different agreement from that entered into by indorsing the note.

The suit is against the representative of Waples as an indorser; but the proof is of a contract of general guaranty, different from the contract of an indorser. As indorser, the defendant must be charged according to that contract, viz: by protest and notice. The subsequent verbal contract of Waples is a substitute for the contract of indorsement; and, being a mere verbal promise to pay the debt of another, is void under the statute of frauds.

What is the contract of an indorser? It is this: I, A. B., promise to pay this note to the holder at maturity, provided it is duly presented at the time and place of payment, and due notice be given to me of non-payment by the drawer. This contract is implied by the indorsement of the payee's name, and the holder has the right to write this contract over the name, but no other. Doubtless the payee could himself vary it by writing any thing over his signature; but the holder cannot; and the mere indorsement implies nothing

else than this. This written contract cannot, therefore, be varied by proof of the parol agreement of the payee to dispense with notice. (1 *Harr. Rep.* 15; *Bank W. & Brandywine vs. Cooper's Adm'r.*, Ros. Civ. Ev. 176, 164, 196; 8 *Taunt. Rep.* 92; 1 *Ch. Bills* 199.)

The waiver of notice must be after dishonor of the bill, to dispense with the protest, and notice; a previous waiver by an indorser is without consideration, and does not bind.

The Court refused the nonsuit without hearing the other side. (1 *Greenleaf's Ev.* 153, § 184.) "The want of a protest is excused by proof that the defendant requested, that in case of the dishonor of the bill, no protest should be made. (*Story on Bills*, § 275, 280; *Chitty & Hulme on Bills* 452; 2 *Stark Ev.* 270; 3 *N. Hamp. Rep.* 32, *Barry vs. Morse*; 8 *Taunt.* 92; 4 *Com. Law Rep.* 31.)

The plaintiff had a verdict.

Wootton, for plaintiff.

Layton, Houston, M^rFee and Bayard, jr., for defendant.



THE FARMERS' BANK vs. JAMES GARDNER'S Administrators.

A claim against the sheriff for not satisfying prior liens out of the proceeds of land sold by him, is excepted out of the act of limitation, as "founded on a record," though the suit be not technically on the record.

DEMURRER. This was an action of debt against a sheriff. The plaintiffs declared setting out a judgment in the Supreme Court, at their suit against James Armor, for \$121 21 with interest, yet unpaid and a lien on the lands of said Armor, from its date; that a writ of plu. fi. fa. was issued at the suit of John Caldwell, on a judgment against said Armor for \$332 56, which writ was directed and delivered to the said James Gardner, the sheriff of N. C. C., to be executed; and upon which he made return "nulla bona, levied on lands per inquisition annexed, which inquisitors say, will not rent within the space of seven years for a sum sufficient to pay the debt;" that thereupon a writ of venditioni exponas was issued and delivered to said Gardner, as late sheriff, upon which he returned that he had sold the lands so levied on, for \$1,767, subject, &c., by virtue of which sale he became liable, and was required by law to pay previous liens; and plaintiff avers that he received from said sale money sufficient to pay plaintiff's judgment, and all prior liens;

whereby action hath accrued to the plaintiff to demand and have from said defendants the sum of \$196 78: yet the said James Gardner, sheriff as aforesaid, hath not paid, nor have the defendants, his administrators, paid, &c. &c. To this declaration the defendants pleaded the act of limitation; and plaintiffs demurred.

In the argument of the demurrer, *Bradford and Bayard*, for plaintiff, contended that this was an action founded on a record within the meaning of the act of limitation, sec. 5, (*Dig. 397.*) "No action of trespass; no action of replevin; no action of detinue; *no action of debt, not founded on a record or specialty,* shall be brought after the ex-
piration of three years," &c.

The priority of the plaintiff's judgment; the obligation of the sheriff; the fund applicable; and the execution on which sale was made, are all of record.

The reason of the act of limitation does not apply to such a demand as this. A similar English statute of limitation, 21 Jac. 1, ch. 16, is held not to extend to such a case. (*2 Saund. Rep. 67, n. 10; 2 Mod. Rep. 212; 2 Shower 79, S. C., Cochram vs. Welbye.*) The words "founded on a record," do not mean that the action should be brought on the record; but have reference to the record as evidence of the debt.

Whately and Wales, contra, said that the decisions referred to, are made on the statute, 21 Jac. 1, ch. 16; which differs sufficiently from our act to distinguish the cases. Our act of limitation refers to such actions founded on record as would be answered by a plea of *nul tiel record*. The return of the sheriff of his sale of land, is a mere ministerial act, and no record. Yet, the whole ground of action in this case arises from this return.

The narr., though in form in debt, is nothing more than a declaration in assumpsit for money had and received. If an action of assumpsit would lie in this case, the return cannot be such a matter of record as that the plea of the act of limitation will not apply. The liability of the sheriff is not from any act of the court, but from his own indorsement on the writ, which is a mere acknowledgment of a fact which charges him with the money.

It has been held that an action against a sheriff for an escape was not within the statute of Jac. (1 *Levinsz* 191.)

A balance appearing on an administration account against an executor, though settled by the register, is not a debt of record. (3 *Harr. Rep.* 433.)

The action cannot be on the record, because there is nothing on the record to ascertain the amount of the demand.

By the Court:

Booth, Chief Justice.—The question presented by the demurrer is, whether the present action is barred by the 5th section of the act entitled “An act for the limitation of certain personal actions and of exceptions to accounts;” or, in other words, whether this action, within the intention of the act, is founded upon a record. If it is, it is not within the act. If it is not so founded upon a record, it is barred. (*Sec. 5, Dig. 397.*) “No action of trespass; no action of replevin; no action of detinue; *no action of debt not founded on a record or specialty*, shall be brought after the expiration of three years,” &c.

The defendant's counsel have contended that the present action is not founded upon a record; but upon the fact of James Gardner having received under execution process, the amount of sales of James Armor's lands, and upon the implied promise which the law raises from the legal obligation of the sheriff, to pay over to the plaintiffs the principal and interest of their judgment: that the declaration filed in this case, although in form, a declaration in debt, is merely for money had and received; for which assumpsit would as well lie; and, as the latter action cannot be founded on matter of record, this present action of debt cannot be considered as being founded on a record; but is founded in matter of fact, and the record is only inducement to the action.

The whole argument against the demurrer is based on a fallacy. It assumes as a principle, that an action of debt is not founded upon a record, unless the record itself constitutes the cause of action, and unless *nul tiel record* is a proper plea. Therefore, where the cause of action arises from a legal liability depending on a matter of fact, of which the record is the evidence, as *nil debet* and *not nul tiel record*, is a proper plea, the action cannot be founded upon the record, but upon matter of fact: and the conclusion is, that in the former case, the action is not within the operation of the act of limitation; and, that in the latter case, the action is barred. Were this mode of reasoning correct, it would follow, that the present action, to which *nil debet* is properly pleaded, and *nul tiel record* would have been a bad plea, is barred by the act.

That there is a distinction between the two classes of cases, as regards pleading, is admitted; but that any exists, as regards the act of limitation, is denied. Both are excluded from its operation, and for the same reason. The object and policy of the act of limita-

tion is to prevent the institution of suits at a remote period of time from the accruing of the cause of action, where the claim or demand depends on evidence not permanent in itself; but which by lapse of time, by the imperfect memory, or by the death of witnesses, is rendered doubtful and uncertain; and where injustice, fraud, or perjury might be resorted to, for the purpose of substantiating or resisting claims that have long been permitted to lie dormant. The act of limitation wisely and beneficially interposes, by requiring suits to be brought within a reasonable time, when all the facts and circumstances under which a right of action may be enforced or opposed, are fresh in the memory of witnesses; and by barring the remedy of those who slumber on their rights, and neglect to litigate their claims within the time prescribed by the act. Hence, its several provisions have reference to the nature and character of the evidence, which it is necessary to produce, to sustain the action. Where the evidence is not fixed or permanent in its character, the remedy is barred after the expiration of three years from the accruing of the cause of action. Where the evidence is rendered more durable by the demand or cause of action being reduced to writing, the period of limitation is six years. But where the right of action is fixed, permanent, and so certain, that it cannot be changed, misconstrued, or misunderstood, as in the case of a specialty or a record, the act of limitation is silent, and leaves the case to the common law presumption of payment or satisfaction after the lapse of twenty years.

No difference exists in reason, or in the obvious intention of the act, whether the record itself constitutes the cause of action, as in the case of debt on a judgment, or a recognizance for the payment absolutely of a specific sum of money; or whether the record shows a legal liability or obligation to pay a certain sum of money, for the recovery of which an action of debt is brought. In both cases the record furnishes the same permanent and unalterable evidence for establishing the claim; and must be set forth in the declaration. In debt on judgment, the declaration sets forth simply the judgment; because on that alone the defendant's liability is founded; but in an action of debt like the present, the declaration sets forth the judgment, the amount of which is sought to be recovered, the execution process under which the levy was made and the lands sold, and the defendant's return on such process; because they are all matters of record essential to the right of action, and on which the liability of the defendant as sheriff, is founded. In each case, the declaration expressly alleges that by means or by reason of the record, an

action has accrued to the plaintiff to demand and have of the defendant, the sum demanded.

The statute 21 James 1, ch. 16, bars "all actions of debt grounded upon any lending or contract without specialty." Our act bars all actions of debt "not founded upon a record or specialty." The meaning of each is substantially the same. The cases cited by the plaintiff's counsel from 2 *Shover's Rep.*, 2 *Modern*, and the note of Sergeant Williams, in 2 *Saunders* 67, are conclusive authorities upon this question.

The opinion of the court therefore, is, that the plaintiff have judgment on the demurrer.

Bradford and Bayard, for plaintiff.

Wales and Whately, for defendant.



JOHN F. MAYBIN, garnishee, def't. b. *vs.* WILLIAMSON & MILLER, plffs. b.

The judgment against a garnishee whose answer admits a specific chattel, must be that he deliver the chattel, and cannot be for the payment of money.

CERTIORARI to Justice Bradley.

The record showed regular proceedings and judgment by attachment against one Bingham; and that Maybin was summoned as the garnishee of Bingham. He appeared and answered "that at the time the attachment was served on him, there was in his possession a bay mare of the value of \$40, belonging to Elijah W. Bingham, and nothing more. Defendant requested to deliver to constable said mare, who refused to do so." Whereupon, judgment having been rendered against the original defendant, the justice gave judgment against the garnishee for \$26 78; the amount of the original judgment.

This was the exception; that judgment was erroneously entered for a sum of money, when it should have been for the mare specifically.

The Court reversed the judgment on this ground. No judgment could be regularly given against a garnishee for money, on a declaration by him admitting a specific chattel in his hands, and nothing more. The justice should have ordered him to deliver the chattel to the constable to be inventoried, and would have had the same right

to commit him for refusing to obey such an order, as for refusing to answer. Even if the mare were not delivered, no judgment could be given in this action for the value; but the constable might have appraised her, and maintained an action against the garnishee for her. (*Dig. 350.*)

Janvier, for the garnishee.



DENNIS REGAN vs. JOHN McCORMICK.

Mode of authenticating records under the acts of Congress.

This was an action of debt on a record from the Circuit Superior Court of law and chancery, for Goochland county, Virginia.

The record of the Virginia judgment, was certified by the clerk, under seal; with a certificate by the sole judge, that the attestation was in due form, and by the proper officer.

Rogers, for defendant, objected to it because there was no certificate by the clerk, of the official character of the judge; and because the certificate of the judge did not show that W. M. was, at the date of the certificate, clerk of the court.

Booth, Chief Justice.—There are two acts of congress regulating the mode of authenticating records, viz : Act of May 26, 1790, for certifying acts of legislatures, and court records; (a) and the act of March 27, 1804, for authenticating office papers. (b) The present

(a) "The acts of the legislatures of the several States, shall be authenticated by having the seal of their respective States affixed thereto. The records and judicial proceedings of the courts of any State, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And such records and judicial proceedings so authenticated, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken." (*Act of May 26, 1790.*)

(b) "All records and exemplifications of office books, which may be kept in any public office of any State, not appertaining to a court, shall be proved or admitted into any other court or office in any State, by the attestation of

record is authenticated under the act of 1790, which provides for it; and is sufficiently authenticated to give it credence. The form of certificate depends on the usage of the State whence the record comes; and if the judge certifies it is in *due form*, this will be sufficient without setting out the form.



JAMES PLUNKETT *vs.* ELIZABETH Le HURAY.

A mere trustee cannot be summoned to answer as a garnishee of his cestuy que trust.

FOREIGN attachment; returned "Laid in the hands of Jonathan Bee, executor of Nicholas Le Huray, dec'd., and summoned him as garnishee."

On motion of *Mr. Rodney*, of counsel for the garnishee, rule to show cause why he should not be discharged from the attachment.

Nicholas Le Huray, by will, dated Jan. 8, 1834, devised that his farm, &c., should be sold for the benefit of his wife and children; and then bequeathed to his wife one-third of the interest of his real estate during her natural life, yearly to be paid to her by the hands of his executor, and after her death the principal to be divided among his children as she pleases. He appointed Jonathan Bee his executor. The farm, &c., was sold by the executor as directed by the will, and the proceeds invested.

Wales.—An attachment will lie wherever a suit will. Here is a

the keeper of such records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of State, the chancellor, or keeper of the great seal of State, that such attestation is in due form, and by the proper officer; and such certificate, if given by the presiding justice of a court, shall be farther authenticated by the clerk or prothonotary of said court, who shall certify under his hand and seal of his office, that the presiding justice is duly commissioned and qualified; or, if the certificate be given by the governor, secretary of State, chancellor or keeper of the great seal, it shall be under the great seal of the State in which such certificate is made. And the records and exemplification so authenticated, shall have such faith and credit given to them in every court and office in the United States, as they have by law or usage in the courts or offices of the State from whence the same are, or shall be taken." (*Act of March 27, 1804.*)

sum certain in the hands of an administrator subject to distribution, for which assumpsit will lie. (3 Harr. Rep. 267-8, *Fitchett vs. Dolby*.)

Rodney.—This is not at all like the case cited. Money cannot be attached in the hands of an administrator. (2 Harr. Rep. 349.) This fund is in the hands of J. B., as a trustee. It is a pure trust; as such, a court of law would not interfere with it, even if a court of chancery would. Property held in trust is not the subject of an execution, or attachment. (1 Com. Dig. Attachment; Doug. 380.) Jonathan Bee cannot be called on in this irregular way, in a court of law, to account for his trust; this can be done only in a court of equity.

Wales.—The property is converted into money; the estate settled; the funds in the garnishee's hands belonging to Elizabeth Le Huray; which she could recover annually from him by action.

The authorities cited are English authorities, which regard an administrator as a trustee merely; but our act of assembly, and decided cases, make him a mere debtor, after settlement of the estate, as to the residue; or as to a legacy; and he may be sued at law or attached.

Court.—The rule must be made absolute. The fund is in the garnishee's hands, strictly as a trustee; and he may be called to account for it in a court of equity. The case of a distributive balance in the hands of an administrator, after the estate is fully settled, stands on special grounds, under the provisions of the act of assembly.

Rule absolute.

Wales, for plaintiff.

Rodney, for defendant.



JOHN YARNALL vs. ELIZABETH F. HADDAWAY.

Requisites of affidavit by landlord against tenant, to procure attachment under Dig. 365.

ATTACHMENT for rent under the first clause of section 9, of the "Act concerning landlords and tenants." (Dig. 365.)

Rule to show cause why the writ of attachment should not be quashed as irregularly issued.

The writ was issued on the following affidavit:

New Castle county, ss. Personally appears before me, James C. Mansfield, prothonotary, &c., Samuel S. M'Caulley, who being duly

sworn, upon his oath, deposeth and says, that Elizabeth F. Haddaway is the tenant of a dwelling and store in the city of Wilmington, belonging to John Yarnall, at the yearly rent of dollars; that twenty-one dollars and seventy-five cents of the said rent will be due on the 25th day of December, instant, 1846; and the further sum of sixty-eight dollars and seventy-five cents, portion of the said rent, will be due on the 25th day of March, A. D., 1847; and that he does, on good grounds, believe that the said tenant intends to remove her effects from the county, and will remove the same, before the said rent will be due.

Sworn and subscribed at New Castle, &c.

Booth, Chief Justice.—The act of 1829, gives a summary remedy to the landlord to recover rent not due, upon the affidavit of himself, or any credible person for him, stating the rent, and when it will be due, and that he does on good grounds believe that the tenant intends to remove his effects from the county, and will remove the same before the rent will be due. This act is in derogation of the common law, and gives a great and dangerous power to a landlord, for which he would be responsible only (perhaps,) in an action for *maliciously* suing out the attachment; and the court ought to require at least the same strictness in the preliminary affidavit, as in an affidavit to hold to bail.

The remedy of this act is given to a *landlord*, against a *tenant*, for premises *demised*, at a *certain rent*, for which the remedy by *distress* would exist when the rent falls due; and these things ought therefore, *all* to appear by the affidavit; namely, that it is made by a landlord or by some credible person *for him*; that the defendant holds the premises by demise at a certain rent, which ought to be stated, the amount thereof, and when it will be due; with the other requisites of the act.

This affidavit is defective, as not showing such a holding by the defendant as would entitle plaintiff to a remedy by distress; for not showing the amount of the annual rent, and when payable; as well as for not showing in whose behalf it is made.

The proceeding under the last paragraph of section 9, of this act, is essentially different. It is a proceeding against the *person* of the tenant for better security, according to section 20 of the general attachment law. (*Dig. 51.*) In that case the defendant is arrested, and upon his appearance in court at the return of the writ, is obliged to give better security, if the court shall see cause on hearing to order it; but if the court shall be of opinion that there was not sufficient

cause for demanding better security, or for causing the defendant to be arrested, judgment shall be given against the plaintiff, who shall be condemned in costs, &c. This opens the whole matter for the judgment of the court where the proceeding is under this clause of the act of 1829; but where the proceeding is by attachment, and founded on the affidavit of intention to remove goods before the rent will be due, so as to defeat a distress, the court have only to inquire whether the affidavit presents a state of facts entitling the plaintiff to the writ of attachment. If his proceeding has been without cause and malicious, the defendant's remedy is by action.

Attachment quashed.

Whately, for the rule.

Gilpin, contra.



BENJAMIN WEBB vs. JOSEPH PINDERGRASS' Administratrix.

A colored person is competent to prove his book of original entries, to make it evidence in a suit, though against a white person.

A party may prove his book of original entries, whether kept by him or by another.

Assumpsit. In this case the administratrix, who was a colored woman, was offered to prove a book of original entries, kept by her for her husband, showing the number of bushels of ashes sold and delivered to B. Webb. Her testimony was objected to; 1st, as a person of color; and 2d, as incompetent to prove the books of her husband, except so far as she made the entries herself.

By the Court.—The act of assembly of 1787, sec. 8, (*Dig. 407,*) recognizes in colored persons the right to hold property, and to obtain redress in law and equity for any injury to person or property; and the act of 25 Geo. 2, (*Dig. 89,*) as to articles properly chargeable in account, makes the oath of the *plaintiff*, together with a book regularly and fairly kept, evidence in all cases to charge the defendant. It would be idle to recognize in persons of color the right to hold property; and to obtain redress in law and equity for injuries to person or property; if the means of this redress be denied them. They could not file a bill in equity to obtain an injunction against a white man to stay any fraud or wrong; and, in cases of mutual dealings, though sanctioned by the law, the white man's book would be evidence, and the black man's good for nothing.

We think this woman competent, under the act of 1787, and from necessity, to prove the book of accounts of her husband; and the principle of this decision was ruled in this State as early as 1793, when upon the same principle of the "right to obtain redress," a colored person was allowed to give evidence against a white man for an assault and battery; the court regarding this as one mode of redress. (*State vs. Bender, 3 Harr. Rep. 572, n.*)

As to the person who shall prove the books of original entry, the plaintiff may prove them generally, whether kept by him, or by a clerk or agent; and such is the constant practice.

Johnson, Bayard and Gilpin, for plaintiff.

Whately and Rogers, for defendant.



JOHN TOWNSEND vs. JACOB GRIFFIN.

A divorce restoring to the wife her lands, &c., divests judgment liens created by the husband; and annuls sales made under such liens.

Quere. As to the constitutionality of special divorce laws, since the act of 1832, giving that jurisdiction to the court.

VERDICT for plaintiff, subject, &c. This was an action for use and occupation of certain lands belonging to Mary Ann Humphries, lately the wife of Peter A. Humphries, in her maiden right. On the 12th of February, 1839, the legislature of this State passed a special act, divorcing from the bonds of matrimony, Peter A. Humphries and Mary Ann his wife, and restoring to her all her lands, &c. Soon after this act was passed, Mrs. Humphries leased the premises to Griffin, and the rent claimed was for subsequent occupation.

Townsend claimed as a purchaser of the land on judgment and execution against Peter A. Humphries, prior to the act of divorce; and the question was, whether the rents belonged to Mrs. H. or to Townsend, the purchaser.

Mr. Wales, for Mrs. Humphries, argued, that on the divorce, Mrs. H. was restored to all her rights in the land, the same as if her husband had died; she being no party to the judgment on which the land was sold, it could bind her land only to the extent of her husband's interest, and only during the continuance of that interest. That the rights of a creditor of Peter A. Humphries, could not extend beyond his right to the property. Whether it was terminated

by death or divorce was the same. His rights in this land all arose from the marriage relation, and he could not encumber it beyond the continuance of that relation. The law protects the wife's interest except so far as she binds it by her own act. (*1 Shep. Touch.* 286.) Personal property of the wife not reduced to possession becomes the wife's on divorce. (*5 Pick. Rep.* 428, 461; *17 Mass. Rep.* 59; *16 Ibid* 486; *2 Rop. Hus. & W.* 138.) And the act of divorce in terms restores to her all her property, as fully and entirely as before the marriage.

Rogers, contra.—P. A. H. was the husband of M. A. H., and was entitled to a life estate in her lands, as tenant by the courtesy initiate. He became indebted, and his creditors sold this land, on liens obtained before the divorce. Townsend bought it. The question then is, whether the legislature can defeat the interest of the creditor by a subsequent act of divorce.

This act was passed on the mere motion of the legislature, without any proof of default of the husband; and this is precisely the case put by the learned judge in the Dartmouth College case, as a clearly void usurpation of legislative power. (See also, *4 Miss. Rep.* 120.)

But this case need not go so far as to deny the right of the legislature to pass an act of divorce; but only that they can, by such an act, divest the rights of creditors.

Mr. Wales replied, that there was no evidence of the grounds for passing the act of divorce, and the court could not inquire into the reasons on which the legislature acted.

As to the power of the legislature to pass divorce laws, and by them to restore to the wife all her lands discharged of liens created by the husband, he cited, *2 Kent Com.* 127; *Reeves Dom. Rel.* 205, 208, 209; and the unquestioned usage of the State.

Having no ecclesiastical courts, this power is necessarily exercised by the legislature.

The *Court* held the matter under advisement; and, at a subsequent term, set aside the verdict, and entered judgment for the defendant. They had been much embarrassed by the difficulty and the great importance, in its general bearings, of one of the questions raised in argument; but they could not feel at liberty, on mere doubts, and in a case which in itself had not required or received the full investigation at bar that was demanded by the general question, to declare void a long system of legislation in granting divorces. They did not doubt, as to the effect of this act of divorce, that if sustained it would put an end to any marital rights of the husband

not already become absolutely his, including his right to the wife's lands as tenant by the courtesy initiate; and to put an end equally to any rights derived through him by a creditor in respect to such marital right.

They said that the marriage contract is one of a peculiar character, and subject to peculiar principles. It may be entered into by persons who are not capable of forming any other lawful contract; it can be violated and annulled by law, which no other contract can; it cannot be determined by the will of the parties, as any other contract may be; and its rights and obligations are derived rather from the law relating to it, than from the contract itself. Hence, it is in the power of the legislature, watching over this highest domestic relation and most important civil institution, to modify and change its rights and legal obligations; unless perhaps, in cases where property has been reduced into possession and used, or rights so exercised as to be incapable of restoration and return.

The right of courtesy is a right appertaining to a *husband*, or one who was such at the wife's death. This right does not become perfect until issue born, and the death of the wife; and can never be perfected if the relation of husband and wife be destroyed before the wife's death. With the destruction of that relation all its rights and obligations cease, of course, and the right of the husband's creditor cannot exceed his right. The lien of the judgment in this case, upon the husband's interest as tenant by the courtesy initiate in the wife's lands, was a right of the creditor vested no further than as subject to all the legal incidents of the relation of husband and wife; uncertain in its character, and liable to be defeated in any way in which the relation can be destroyed before the husband's tenancy became absolute.

As to the constitutional question, the court would not give any judgment upon it. It had not been argued. The investigation that had followed the mere suggestion of the question had raised doubts in the mind of the court, but would not justify a decision at this time against the legislative power.

Judge Harrington supposed the argument against the power to be based on the following principles:

1st. That the contract of marriage is recognized by law only as a civil contract; and its rights and duties are as much under the protection of the constitution, which prohibits the passing of any law impairing the obligation of contracts, as any other matter of mere civil obligation.

2d. That if this contract be capable of destruction by any power under the constitution, the jurisdiction belongs rather to the judicial than the legislative department, or to the conjoint action of both; the legislature declaring by a general law what shall be a good cause of divorce in all cases; and the judiciary ascertaining in the usual forms, whether these grounds exist in the particular case.

As to the first proposition, he remarked, marriage is, in a certain sense a contract; but more properly a compact, or relation. It has certain legal obligations and consequences while existing, and after it is determined; yet it is a contract *sui generis*; unlike any other contract which may be supposed to have been in the view of those who framed this constitutional prohibition. It may be called a contract of imperfect obligation. Many, indeed, most of its duties are beyond the reach of courts and juries, and may be said to be without sanction, unless a power exists somewhere to annul the relation, when its duties are utterly disregarded by one of the parties. The *legal* obligations of marriage are among the slightest obligations resulting from the relation; they are rather the collateral and incidental consequences than the original and prominent objects of this compact. They have reference to the property and sordid interests which attach to the connection; while its more elevated purposes, the happiness of the parties and their offspring, resulting from a due observance of its moral obligations, are entirely unprotected by civil sanctions, and beyond the reach of compensation by actions at law. The marriage gives the husband a right to the wife's property, with certain restrictions. This is a legal right and can be enforced. It gives the wife a right to the husband's exclusive affection and regard; but what legal remedy has she if he violates this, which is the primary object, and an infinitely higher obligation, of the compact? How can she be compensated if he violates the obligation to "forsake all others and cleave only unto her?" Shall the law afford him a remedy for her property by holding sacred and inviolate the contract in its details; while he disregards and despises the same contract, and utterly annuls it, in its original and real object and design? The argument which denies to the legislature the power to pass laws for dissolving the marriage contract is brought to this result; it places the property above the person; and makes pecuniary interests more sacred than the welfare and moral happiness of the parties, in regarding the obligations of this contract. Such could not have been the kind of contracts referred to in this prohibitory clause of the constitution. They must have had reference to civil contracts of a pecu-

niary character, or such as are capable of enforcement by civil remedies; such as have mutual obligation, at least to some extent; for without this, such a contract would be without consideration, and invalid in itself on general principles of justice. Contemporaneous expositions of the constitution gave a restrictive sense to this provision. It was not before, nor has it since been held, that marriage was a contract that might not be annulled by the supreme power upon any principles having reference to its obligations as a contract; though the power, has in some States, been denied to the legislature, acting upon special cases and not prescribing general rules. In the celebrated case of the Dartmouth College vs. Woodward, Chief Justice Marshall observed, that "the provision of the constitution has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general rights of the legislature to legislate on the subject of divorces." (*Dartmouth College vs. Woodward*, 4 *Wheat.* 518.)

2d. If the marriage contract is not of such a nature as to render it inviolable, what is the power in the State to annul it? Does it belong to the legislature, or to the judiciary, or to both? Acting separately or acting together? A leading feature of the constitutions of all the States, is the division of powers into three general branches; and the keeping of these powers separate as far as practicable. Some of the States require in terms an absolute separation; others a qualified or reasonable separation; and others again, as our own, make no declaration on the subject, leaving it to be settled by the spirit of the instrument to be applied to cases as they arise. The constitution of Missouri, for instance, provides that "the powers of government shall be divided into three distinct departments, each of which shall be confided to a separate magistracy; and no person charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others;" (*Const. Misso.*, Art. 2,) and under this provision the Supreme Court of that State declared a special act of divorce by the legislature invalid; (*State vs. Fry et al.*, 4 *Misso. Rep.* 120,) but the court in terms recognized a difference between the constitution of that State and our constitution, which contains no express provision on the subject; and even between their constitution and that of New Hampshire, which has the following provision: "In the government of this State the three essential powers thereof, to

wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." (*Const. New Hampshire*, sec. 37.) The case referred to was decided on the ground that after the legislature had by general law, enacted what should be cause of divorce, an act of divorce in a particular case provided for by the general law, was rather a decree or sentence upon facts established than a law; and fell, therefore, appropriately within the powers charged upon the judiciary; which powers the legislature were expressly prohibited from exercising.

So also in the State of Maine, whose constitution is similar in this respect to that of Missouri; and whose legislature had passed a general law, declaring "that the supreme judicial court shall have exclusive jurisdiction in all cases of divorce," the judges of that court in reply to questions put to them by the Senate, gave the opinion that the legislature could not grant divorces in cases where the supreme judicial court have jurisdiction, though they were "not prepared to deny" the power in other cases. (16 *Maine Rep. Appx.* 479.)

The question then still remains for us, whether the insertion of a provision in the constitution expressly dividing the government powers into three branches, and requiring them to be kept separate, gives any force to this principle, over a constitution, which in fact divides those powers in the same way, and is based on the principle that they shall be distinct. Our constitution says, "the legislative power shall be vested in a general assembly." "The supreme executive powers shall be vested in a governor." "The judicial power shall be vested in a court of errors and appeals, a superior court, a court of chancery," &c.

But the difficult question remains what is judicial power? In many respects, the courts receive subjects of jurisdiction from the legislature, and the general range of causes cognizable before them, is, in many respects, subject to legislative restriction and expansion. "There are many questions," the Supreme Court of Maine, say, "in their nature, essentially judicial, which have not been assigned to, and incorporated into the judicial power." While, therefore, this power of granting divorces remained undefined, even though it be doubtful whether it fall appropriately under the head of legislative power, it could be exercised by the general assembly with more propriety than by either of the other branches of government; but how

is it after the legislature has declared that it was, to a certain extent, judicial power, and that the courts should have jurisdiction over it; and the judiciary has also, by accepting the jurisdiction and acting under it, equally adjudged it to be judicial power? The act of 1832 declares, "that the Superior Court shall have the sole cognizance of granting divorces, where either of the parties had a former wife, or husband, living at the time of solemnizing the second marriage; or where either of the parties shall be wilfully absent from the other, with the intention of abandonment, three years; or in case of adultery; or where the male party is actually impotent at the time of the marriage; or in case of extreme cruelty." Whilst the act of 1832 remains in force, doubts may well exist, whether the general assembly has power by special law to divorce parties for any of the causes specified in that act. As to all other cases it may have been wise to retain the power in the legislature; for there may exist cases of a character improper for public judicial investigation; and also, cases so special in their circumstances, as not to fall within any class defined by general law. But as to the causes of divorce mentioned in this act, there can be no doubt that public and private convenience, and economy, as well as general principles appertaining to the investigation of facts, and adjudication of cases between parties; would all be better served by a judicial, than by a legislative exercise of this power.

Judgment for defendant.

Wales, for plaintiff.

Rogers, for defendant.



WILLIAM JOHNSON vs. SAMUEL TEMPLE, jr.

A ca. sa., cannot issue against a white inhabitant of this State without the evidence of his inability to pay, required by the act of 1785; and *also* the affidavit of fraud required by the act of 1841.

Ca. sa., on a judgment rendered against the defendant. The plaintiff made oath as required by the act of 1841, (9th vol. 423,) and the defendant was committed to prison.

Mr. Wales, at the next term, moved to quash the writ of ca. sa., on the ground that no previous execution process had issued against the goods, and no return of nulla bona had been made. (*Dig. 215.*)

By the Court. —The act of 1785 (*Dig. 215.*) reciting that "per-

sonal liberty is one of the greatest privileges that freemen enjoy, and ought not to be violated in any case whatsoever, unless where substantial justice absolutely requires it," provides, that the writ of ca. sa., shall not be issued on any judgment against any defendant, "being an inhabitant of this State," until it shall have been ascertained by the return to a writ of fieri facias, or by the oath of the plaintiff in such judgment, that the defendant has not sufficient personal or real property to satisfy such judgment.

The act of 1841 provides, that no writ of ca. sa., shall be issued upon a judgment against any free white citizen of this State until the plaintiff, or some credible person for him, shall swear or affirm that the defendant is justly indebted to him in a sum exceeding \$50, and that he verily believes the defendant has secreted, conveyed away, assigned, settled or disposed of, either money, goods, chattels, stocks, securities, &c., of more than \$50 value, with intent to defraud his creditors.

These acts are consistent with each other. The latter carries out the object of the former, and extends it. There is no inconsistency between them; and no reason why the last act should be taken as a substitute for the first, or in any way to repeal it. The legislature of 1841 intended to prevent imprisonment for debt, not only where the defendant *has* sufficient real or personal property to pay the debt, but also where he *has not* sufficient property unless he has been guilty of fraud in disposing of his property. And, therefore, leaving the act of 1785 in full force, they provided additionally, that the writ of ca. sa., should not be issued without an affidavit charging the defendant with fraud. The writ, therefore, in this case, having been issued without having previously ascertained the defendant's inability to pay the debt, in the manner directed by the act of 1785, cannot be sustained against an inhabitant of this State.

Bayard and Rogers, for plaintiff.

Wales, for defendant.

A question remained, whether it appeared that the defendant was "an inhabitant of this State;" and, upon that question, the case finally turned.

MOSES R. McHENRY vs. THE PHILADELPHIA, WILMINGTON and BALTIMORE RAILROAD Co.

A common carrier is bound to deliver goods safely; and to store them when necessary; unless a well known usage be contrary.

The obligation of carriers is more stringent than that of warehouse-men; who are bound only to ordinary care.

THIS was an action on the case, against defendants, as common carriers, for negligence. The plaintiff booked a large quantity of rags for transportation by defendants' railroad, from Philadelphia to Wilmington. They were carried safely, and left at Wilmington, without storage, exposed to the weather, by which they were injured.

The defendants contended, that they were bound only for the safe transportation of the goods, and delivery at the place of consignment. They were carriers, and not warehouse-men. They were not bound to store the goods; but plaintiff, to whom they were consigned, was bound to receive them from the cars at Wilmington, or to provide storage. (*6 Hill's Rep.* 157; *4 T. Rep.* 311.) This was the usage. (*Story Bailm.* 538, § 543; *17 Wend. Rep.* 305.)

The plaintiffs contended: 1st. That a common carrier was bound to deliver the goods to the consignee, or owner either actually or constructively, that is, by notice. (*4 Kent Com.* 597, 604; *7 C. & R.* 21, 399; *15 Johns. Rep.* 39; *4 Pick. Rep.* 371; *Story Bailm.* 538; *33 C. L. R.* 364; *6 Watts & Serg.* 62.) 2d. That defendants were liable either as bailees for hire, or depositories without compensation, for such negligence as leaving goods exposed to the weather. 3d. That there was no proof of a custom, such as would control the law. (*2 Johns. Rep.* 335; *5 Watt's Rep.* 178.)

BOOTH, *Chief Justice*, charged the jury.—A common carrier is one who undertakes and exercises, as a public employment, the transportation or carriage of goods for persons generally, from place to place, whether by land or by water, and to deliver them at the place appointed, for hire or reward, and with or without a special agreement as to price. (*2 Kent's Com.* 598; *Story on Bailments*, sec. 495; *Chitty on Cont.* 149.)

The owners of stage-wagons, stage-coaches, and railroad cars, who carry goods, as well as passengers, for hire; wagoners, teamsters, and cartmen, who undertake as a common employment, to carry goods for hire, from one town to another; the masters and owners of ships, vessels, steamboats, barge owners, canal boatmen,

and ferrymen, employed in the like business, are all common carriers.

A common carrier is bound to exercise the strictest care, and to deliver safely at their place of destination, the goods entrusted to him. He is regarded by the law in the light of an insurer; and in case the goods are injured, lost or destroyed, nothing will excuse or discharge him, but the act of God, or of the public enemies. By the act of God, is meant such inevitable accident as cannot be prevented by human care, skill or foresight; but results from natural causes; such as lightning and tempest, floods and inundation.

This rule of the common law has been spoken of as severe and rigorous; but like most of the principles of the common law, it is founded in wisdom, and dictated by sound policy. The exigencies of society require the adoption of the rule. Men engaged in the various business transactions of life, are obliged from necessity, to entrust common carriers with their goods. If such carriers are to be excused from all loss, destruction of, or injury to goods, in case it be shown that they have used due care, precaution or attention, the party employing them, could never show the want of such care, unless he had an agent to accompany his goods during the whole time occupied in their transportation. The carrier might at all times, by fraud and collusion, or by means of his own agents or servants, throw the burden of proof upon the owner or consignee of goods, by making out a statement of facts, which, although untrue in itself, would show the exercise of ordinary care and diligence. Therefore, in actions against common carriers, founded on their ordinary liability for the loss of goods, the inquiry is not whether the carrier has used due care, or been guilty of negligence, but whether he can show that the loss happened by inevitable accident or by the public enemies.

In the present case, the injury to the goods did not arise from accident; but as it occurred after their arrival at Wilmington, the defendants insist, that the goods were then out of their possession; and therefore, that they are not liable; that by the uniform course and usage of their business, when goods safely arrive at the depot in Wilmington, and are deposited on the pavement, it is considered as a delivery to the owner or consignee; exonerates the defendants from any further care or control over the goods, and terminates their liability as common carriers.

The responsibility of a common carrier commences the moment he has received the goods for transportation, and continues until he

has make due delivery of them at their place of destination; or has otherwise legally discharged himself of the custody or control of the goods in his character of common carrier. What constitutes such a delivery, or what exonerates him from the custody of the goods as a common carrier, depends on the nature of the trade or business in which he is engaged, and the usage or custom in relation to it.

If it be part of the carrier's business, when the goods have arrived at their place of destination, to deliver them at the house of the owner or consignee, he is bound to make such delivery; and, until he has done so, the goods continue in his custody as a common carrier. Therefore, if instead of delivering them, he puts them into a warehouse for safe keeping, and they are consumed by accidental fire, he is liable for the loss. (*Hyde vs. Trent & Mersey Navigation Company*, 5 *Term Rep.* 389.) But where he receives goods to be carried by him from one place to another, which is at the termination of his route; thence to be forwarded by a distinct conveyance to another place; it is his duty, as soon as he arrives at the place to which he engaged to carry the goods, to deliver them to the carrier, (if there to receive them,) by whom they are to be conveyed to their place of final destination. If such carrier be not present, or there be no agent, to receive the goods, it is the duty of the former carrier to deposit them in a warehouse for the purpose of being forwarded. When he has done so, he discharges himself from the custody of the goods as a common carrier; and becomes in regard to them, a mere warehouse-man. (*Garside vs. Proprietors of the Trent & Mersey Navigation Co.*, 4 *Term Rep.* 581; *In re Webb et al.*, 8 *Taunt.* 443; 4 *Com. Law Rep.* 159.)

The general rule is, that a common carrier remains liable until an actual delivery of the goods to the owner or consignee. But where it is the usage of the particular trade, or the course of the business in which the carrier is engaged, to deposit goods at regular stopping places on the carrier's route, to which they are directed, it seems that such deposit is sufficient, without an actual delivery to the owner or consignee. But the usage or custom must have been of such long continuance and notoriety, as to warrant a jury to find that the owner or consignee of the goods had knowledge of it; because having such knowledge, it is presumed that the usage made part of the contract, and is equivalent to a direction given by the owner or consignee to the carrier, to deposit the goods at the stopping place. (*Gibson vs. Culver & Brown*, 17 *Wendell* 305; 2 *Kent's Com.* 605, note, d.)

But although the existence of such usage be fully established by sufficient evidence, yet, if the owner or consignee be not present to receive the goods, at the time of their arrival, the carrier will not be excused, if he leaves them at the stopping place, in such a situation as exposes them to injury by the weather, or loss by theft. It is his duty to have them put in some safe place for security and protection; and until he has done so, his liability as a common carrier does not cease.

Whether such usage exists in the present case, and was known to the plaintiff, is a question for the jury. Admitting both facts to be proved, it became the duty of the defendants when the goods arrived in Wilmington, to make a personal delivery of them to the plaintiff or his agent, if at the depot; but if neither was there to receive them, it became their further duty to put them in a warehouse, or other secure place, for safe keeping; and immediately to give notice to the plaintiff to come and take them away. By storing the goods, the defendants would have become mere warehouse-men; and been liable only for such losses as arise from want of good faith, reasonable care and ordinary diligence. But until the goods were safely put in a warehouse, the defendants continued responsible as common carriers; and, therefore, are liable for any loss or injury that happened in the mean time; unless they can bring themselves within one or the other of the two excepted cases, namely: the act of God, or of the public enemies.

But it is said, that the defendants are not liable after the goods were deposited on the pavement at their depot at Wilmington; because they had no warehouse. The answer is, that the business in which they were engaged, required them to have a warehouse. If they had none of their own, they were bound to find one. The costs and expenses of the storage of goods is a proper subject of charge against the owner or consignee, until, after notice given, he comes and takes them away.

If it is proved in this case, that the goods were injured in their transit from Philadelphia to Wilmington; or after their arrival at the latter place, and before storage; the defendants are liable as common carriers. The measure of damages is the difference between the value of the goods when delivered to the defendants in Philadelphia, and the value of them in their damaged state, when received by the plaintiff at Wilmington.

Verdict for plaintiff.

Johnson and Rogers, for plaintiff.

Wales and Gilpin, for defendants.

SUPERIOR COURT.

SPRING SESSIONS,

1847. (a)

WM. D. ANDREWS, agent, d. b. app'l't. *ats.* ALLEN, et al., owners of
the schooner Gen. Harrison, pl'f's. b. resp'ts.

An agent is liable on his own contract, though his principal be known.
The nonjoinder of proper defendants must be pleaded in abatement.

This was an appeal from the judgment of a Justice of the Peace.
Narr., in assumpsit, on the usual counts, and on a special contract of
affreightment. Pleas, non-assumpsit, payment, set-off, discount and act
of limitation.

The ship Walter was wrecked near Indian river, in Oct. 1844,

(a) The following rules of court have been adopted since the publication
of the rules of court in 2 Harr. Rep. 161.

RULE 42. At the instance of the bar it is directed that objections to road
and ditch returns be made in writing, and supported by affidavit, where the
objections to the return rest upon facts not appearing from the record. (Fall
Sessions, 1841.)

No. 43. In all cases of taking special bail, by the prothonotary, in va-
cation, reasonable notice of justification shall be given to the opposite party,
or his attorney. (Fall Sessions, 1842.)

No. 44. In all actions ex contractu pending in this court, judgment for
the plaintiff shall, on motion, be entered at the second term, unless there be
an allegation, supported by regular affidavit, that there is a legal defence to
the action. Such affidavit shall be filed during the term, unless the court
do, on motion, enlarge the time. (Spring Sessions, 1845.)

No. 45. Notice of holding inquisitions on land, or of sale, shall be served
personally on the defendant, if residing in the county. If he does not re-
side in the county, notice shall be served on the tenant, or if there be no

Wm. Andrews for Nahum Andrews, who had a contract to save the goods, employed captain Allen of the schooner General Harrison, to convey goods from the ship to Philadelphia for \$125, and \$10 a day for demurrage. Captain Allen was detained at Philadelphia by the revenue officers several days. The consignee paid the freight, and referred the matter of demurrage to Andrews himself.

Layton, for defendants, moved a nonsuit, 1st. Because the action was brought against an agent, where the principal was known. Where the agent discloses his principal, the only remedy is against the principal. (1 *Chit. Pl.* 25, 74; 15 *East* 62-6; 15 *Ves.* 352; *Palley P. & A.* 246; 3 *Camp.* 817; 2 *M. & S.* 438.) 2d. Because the evidence showed a joint contract of Wm. and Nahum Andrews. 8d. Because the contract was in writing, and could be proved only by the bill of lading, which fixes the freight at \$125, without any reservation for demurrage. (17 *Law Lib.* 103-5; *Smith on Merc. Law* 173-5.)

The Court refused the motion: 1st. An agent contracting personally, is personally liable, though his agency be known, and the principal be disclosed. (2 *Kent's Com.* 630; 1 *Saund. Pl. & Ev.* 82, 72.)

2d. If this be a joint contract, it is not a ground for a nonsuit. That must be pleaded in abatement. It is no less the contract of W. D. Andrews because it is also the contract of N. Andrews. And if a defendant would object, that not only he,

tenant, shall be left at the mansion house, or other notorious place on the premises. (Fall Sessions, 1845.)

No. 46. It is ordered by the court, that in every action of ejectment, the defendant shall specify, by general description in the consent rule, for what premises he intends to defend; and shall consent in such rule to confess upon the trial, as well as lease entry and ouster, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration in possession of such premises. (Spring Sessions, 1847.)

No. 47. It is ordered by the court, that in future, applicants for admission to the bar, subject to examination, shall be privately and fully examined by a committee of three members of the bar, to be appointed by the court; and shall be admitted only on the written report of the examining committee, or a majority of them, stating the qualifications of the applicant, and recommending his admission. (Spring Sessions, 1847.)

but others, made the contract, he must plead it. Not so of a plaintiff. He knows with whom the contract was made.

3d. The third ground depends on evidence yet to be produced by the defendant, and cannot be any reason for a nonsuit.

Verdict for plaintiff.

Houston, for plaintiff.

Layton, for defendant.



JOHN R. DRAPER vs. EDWARD T. RANDOLPH & Co.

A party may recover for a partial performance of an executory contract which has been terminated by the defendants' refusal to permit further compliance, or to comply on his part.

In a declaration on a special contract, with the common counts, and proof of a different contract, there can be no recovery either on the general or special counts.

The law will not imply a contract, when an express one is proved.

But if no special contract be proved, there may be a recovery on the implied contract for whatever is done and accepted.

A party may recover for part execution of a special contract differently from its requirements, if the substituted performance has been accepted; but the defendant is entitled to have a deduction for the improper execution.

This is recouping damages in assumpsit.

THIS case was instituted by writ of foreign attachment against the defendants; who appeared and dissolved the attachment by filing special bail. The plaintiff declared in case, with general and special counts, setting out a special agreement between the parties for the raising four to five hundred tons of iron ore, from the defendant's beds at Gum Branch, in Sussex county, and delivery of the same at Millville, New Jersey, at \$3 per ton, the plaintiff averring that he raised and delivered 136½ tons at Millville, and 109 tons at Milford, on the way to Millville, when he was prevented from completing the contract by notice from the defendants not to raise or send any more.

The plaintiff proved an admission by defendants that there was a contract between them and him, relative to the raising and delivery of this ore; the acceptance of, and payment for 79 tons at \$3 per ton; an order to go on raising and delivering more ore; a refusal to pay for the next load, being 58½ tons, on the ground that it was worthless; and a declaration that they would receive no more such.

The defendants contended that the contract between them and

plaintiff, was different from the one declared on; that it was a contract for the raising and delivery of "four to five hundred tons of good, clean, stone loam, and washed seed iron ore," from Gum Branch, or from another bed of defendants' on the Green estate; that the third load of ore was not good, clean, stone loam, washed iron ore, but was loam, mud and sand, unfit for use, as was the ore delivered at Milford; and that they were not bound to accept, or pay for it.

Bayard and *Cullen*, for defendants, contended, that if this contract was proved, the plaintiff was not entitled to recover at all: not upon the special contract, for a different one was proved; nor upon the common counts, there being an express contract. That, even if plaintiff's special counts were proved, they show an executory contract, unperformed, upon which no recovery could be had; or if any action would lie, as for a part performance, the defendant was entitled to "recoup" or set-off against the claim, the damages sustained by them by reason of the nonperformance of the entire contract. They cited, 2 *Greenleaf's Evid.* 78-9, secs. 103, 104; 3 *Chit. Plead.* 334, n. 4; 14 *Wend.* 257; 14 *Mass. Rep.* 202; 1 *Camp. Rep.* 38; 14 *Com. Law Rep.* 145, 400; 7 *East Rep.* 789; 2 *Camp.* 416; 2 *Mass. Rep.* 147; 13 *Johns. Rep.* 94; 8 *Cow. Rep.* 63; 42 *Ibid.* 452.

It appeared that the defendants had a contract with John A. Hazzard, for raising and delivery at Millville, New Jersey, from Gum Branch and the Green estate "four to five hundred tons of good, clean, stone loam, and washed seed iron ore" by a certain time which was expired; and the evidence upon which the plaintiff relied as proving a contract with him, was an admission made by one of the defendants to the father of Mr. Hazzard, after his contract had been abandoned, "that Draper had taken the contract of John A. Hazzard, for raising ore from Gum Branch" without stating quantity, terms, time or price; and without any mention of the ore from the Green estate. He contended that, on general proof of a contract to raise and deliver ore from Gum Branch at \$3 per ton, he was entitled to deliver such ore as that branch furnished, without regard to quality; and, the defendants' having put an end to the special contract by refusing the ore, he was entitled to recover for all the ore delivered at \$3 per ton; and to be remunerated for the expense of raising other ore not delivered because defendants would not receive it.

He had delivered one load of 51 tons, and another of 27 tons, which were of good, stone, and seed washed ore; a third load of 58½

tons was forwarded, which was of unwashed loam ore, which the defendants would not receive, and which was proved to be of very inferior value, if not worthless.

Mr. Layton, cited, *Ros. Civ. Ev.* 221; 5 *Car. & P.* 58; 1 *Ch. Pl.* 297, 333, 334, 336; *Doug.* 665; 13 *East Rep.* 410; 7 *Cranck* 408, 413; 12 *East* 1; *Bull. N. P.* 139, 140; 1 *Greenl. Ev.* 80, § 67; 1 *Steph. Pl.* 118, 119; 44 *Law Lib.* 1; *Arch. N. P.* 145, [10;] 2 *Harr. Rep.* 488.)

JUDGE HARRINGTON, charged: 1. That if the plaintiff had proved his contract as laid, for the raising and delivery of such ore as he did raise from Gum Branch, whether good or bad, he was entitled to recover; because though it be an executory contract, not fully performed, the plaintiff was entitled to consider it at an end by the defendants' refusal to comply with their part of it; and to recover on the general counts, apart from the contract for what he had done under it. (*Cutter vs. Powell*, 44 *Law Lib.* 14, note.)

2. That if the contract proved was, as contended by the defendant, viz., a substitution of the Hazzard contract, for the delivery of "good, clean, stone loam, and washed seed ore," the plaintiff was not entitled to recover any thing: not upon the special contract, for a different one would have been proved; and not upon the common counts for the law never raises an implied contract when an express one is proved. (2 *Greenl. Ev.* 78, § 103; 2 *Harr. Rep.* 488.)

3. If neither the contract set up by the plaintiff nor that contended for by the defendants was proved, and no special contract was proved, the plaintiff was entitled to recover on the common counts for the twenty-seven tons of ore delivered and accepted by the defendants, and not paid for, as for goods sold and delivered; but he was not entitled recover for the ore not accepted, without proof that it was raised and forwarded at the defendants' request.

4. That if the plaintiff had proved a special contract as laid, and a part execution of it, not strictly within its terms, as by the delivery of ore of inferior quality; if such ore had been accepted by the defendants, the plaintiff would be entitled to recover for such part performance, subject to a deduction of the damages which defendants sustained by the non-performance of the contract strictly and entirely. This is what we understand by recouping damages in an action of assumpsit. (2 *Greenl. Ev.* 80 § 104; 14 *Wend. Rep.* 257.)

The plaintiff had a verdict for \$447 20.

Layton, for plaintiff.

Cullen and Bayard, for defendants.

THE STATE, use of ROBINSON, *vs.* BENJ. BURTON and seven others.

The sheriff is entitled to a levying fee against each of several defendants in an execution.

He is not entitled to an advertising fee, though the advertisement be omitted at the defendant's request.

ALIAS fi. fa., debt. Real debt \$928 39; interest from the 19th of October, 1846. Returned "Levied on goods as per inventory and appraisement, and settled to sheriff."

Costs:—Levying on eight defendants \$32; appraisers \$4; advertising \$4 80; dollarage 974 58—\$29 23; total \$70 03.

The defendants filed an affidavit that the execution had been settled within thirty days after the levy and notice, and obtained a rule for taxing the costs; objecting to the separate levying charges, the advertising fee (as there had been no advertisement,) and the charge of dollarage.

The Court said that prior to the act of 1826, it had been decided that where the sheriff omitted a levy, or stayed an advertisement, at the request of the defendant, as it was for his benefit, he should not be allowed to object to the sheriff's fee for the service which he had thus prevented. But the act of 1826 prohibits the allowance of a fee for any service before it is performed; and as there had not been in fact any advertisement, the court disallowed that charge. They allowed the several levying fee, and the dollarage, it appearing that the thirty days had expired before actual payment.



LEVIN LANK *vs.* KINDER & HORSEY, executors of Horsey.

One of several executors may enter into an amicable action and submit to arbitration so as to bind the estate.

RULE to show cause why an award should not be set aside.

Nathaniel Horsey, together with Owens Kinder, were administrators of Josiah C. Horsey, deceased; and Kinder entered into an amicable action with Levin Lank, at the suit of said Lank *vs.* Kinder and Horsey, as administrators of Josiah Horsey, and the arbitrators reported a sum due to plaintiff of \$63.

On which *Woolen*, for the administrator, Horsey, who was also a

creditor, obtained a rule to show cause why the award should not be set aside, as the submission was without his authority.

McFee showed cause and cited (*Wms. Ex'rs.* 620-1.) Co-executors are regarded as one, and the act of one binds all, &c. (2 *Leigh's N. P.* 981.)

Rule discharged.

McFee, for plaintiff.

Woolten, for defendant.



REUBEN BOWMAN *vs.* SAMUEL HERRING.

The sale or pledge of personal goods without a transfer of possession is void against creditors.

THIS was an action of replevin for a mare, tried in Kent at the May term, 1847. The pleas were, 1st., non cepit; 2d., justification as a constable under execution process against Peter Fisher; replication to the second plea, that the mare was not the property of Fisher.

The proof was, that Fisher bought the mare of John W. Webb, in April, 1846, for a cow and yearling and \$20, which he was to secure by his note with approved surety. He delivered the cow and yearling to Webb, and Reuben Bowman agreed to become his surety on the note with the understanding that Bowman was to hold the mare as collateral security until the note was paid, and if not paid he was to have the mare, and pay Fisher for the cow and yearling. The mare was delivered to Fisher and continued in his possession until she was levied on by defendant on the execution of John Thompson, who was the real defendant in this case. This levy was made in August, 1846; the note of Fisher and Thompson to Webb fell due Sept. 3, 1846, and was paid by Bowman soon after maturity, who also paid Fisher \$12, as the agreed price of the cow and yearling.

Smithers, for defendant.—1. The private arrangement between Reuben Bowman and Peter Fisher may be good between themselves; but as to third persons, particularly as to creditors, it is null and void.

2. Possession of personal chattels, is always presumptive evidence to all the world of ownership.

Bates, for plaintiff.—Possession is evidence of ownership; but property may be hired or may be pledged. This case is not within our

act of assembly. A poor man is not to go without property, or be deprived of property, because he pledges it for security for the payment of it. This is the case of a defeasible sale. Fisher merely mortgaged or pledged this mare to Reuben Bowman. There may be a mortgage of personal property without being in writing. This is a mortgage subject to be redeemed by Fisher, upon his paying the note of \$20.

Unless possession accompanies the transfer, it is fraudulent in case of an *absolute* sale. (*Smith's Lead. Cases 40.*) The property in this case was sold to Bowman, and the retention of the mare by Fisher was consistent with that sale; with the agreement of the parties; and therefore not fraudulent.

Smithers replied.

The Court charged, that the only question was, to whom did this property belong, at the time it was taken in execution, namely, Aug. 4, 1846?

Webb, in April, 1846, sold the mare to Fisher for \$32, to be paid for by delivery of a cow and yearling at \$12, and a note for \$20, with a surety to be approved by Webb. Fisher took the mare home, the evening of the vendue. Reuben Bowman became the surety of Fisher in the note, upon Fisher agreeing that if Bowman was obliged to pay the note, and would pay Fisher for the cow and yearling, he was then to be the owner of the gray mare.

Such a transaction, however proper it might have been between the parties, is deemed legally fraudulent against creditors or third persons, and is void by our act of assembly. It induces a false credit, and may operate to the injury of persons trusting the apparent and supposed owner of the property, on the credit of such property. Possession of personal goods is evidence of property; and the retaining possession, after a sale of such goods, may deceive persons ignorant of the sale. From the danger of such consequences the legislature have thought proper to declare all such sales void against creditors.

The jury, nevertheless, gave a verdict for plaintiff.

Bates, for plaintiff.

Smithers, for defendant.

ABRAM J. LEWIS vs. LAMBERT S. NORWOOD.

The courts of this State recognize insolvent discharges in Maryland, which do not affect the contract.

RULE to show cause why an exoneretur should not be entered on a bail piece, on the ground that, since the entry of bail, the defendant, Norwood, had been discharged under the insolvent laws of Maryland.

Bayard, for defendant, moved to make the rule absolute, and cited, 1 *Harr. Rep.* 367; 3 *Ibid.* 271; 4 *Wheat. Rep.* 200; and produced evidence that the courts of Maryland gave effect to insolvent discharges by the courts of Delaware.

Rogers, jr., opposed the motion, on the ground that the Maryland insolvent law did not discharge the body only, but the contract, and was such as the comity of our courts could not respect. It was in effect a State bankrupt law; and unconstitutional as to contracts made out of the State. The creditor in this case was a citizen of Pennsylvania. (4 *Wheat. Rep.* 200; *Pet. Dig.* 325.)

Mr. Bayard, replied, that the decision in *Sturges vs. Crowningshield*, was that the law of the State, so far as it contravenes the Constitution of the United States is void, and no further; so far as it is constitutional the courts will hold it good and carry it out. The question in that case was, whether a State could pass a bankrupt law, and the result was, that when Congress had not acted, a State could pass such law to operate within its own borders, but that it would be unconstitutional and inoperative as to citizens of other States. It decides that imprisonment of the person was only a mode of remedy for recovery of the debt, and could be abolished without affecting the contract. A State law then, whether a bankrupt law or an insolvent law, so far as it operates to discharge *the person* from prison, is constitutional in reference to citizens of different States, as well as citizens of the State making the discharge; and *to that extent* such a discharge will be recognized by the comity of this court towards the courts of any other State reciprocating this comity.

As to the Maryland law and the Maryland discharges, the effect is precisely the same as our laws and discharges, though in different language. It is an insolvent law and not a bankrupt law. It requires an assignment by the insolvent of all the property he has, and discharges him from his debts; providing, however, that all future acquisitions of property should be liable to his debts. This is no more than a discharge of the person; nor more than the effect of our

own discharges, which on assignment of the debtor's property discharges his person, leaving property subsequently acquired liable to his debts.

The defendant here asks an exoneretur of his bail, whose obligation is merely for the production of the debtor's body to be imprisoned: his application to the court is to recognize the discharge in Maryland so far as to discharge the defendant's person from imprisonment. If we were seeking to give to this discharge, or to the law of Maryland here, the effect of discharging the defendant's subsequently acquired property from liability, the court would regard such an effect of the law as unconstitutional, and would not extend its comity thus far; but when we ask to give it such an effect as is perfectly consistent with the Constitutions of the United States and of this State, it in nowise conflicts with our laws or practice; but is doing the same thing which we would do ourselves.

The court made the rule absolute.

Bayard, for the rule.

Rogers, jr., contra.



HARVEY BELCHER *vs.* ADAM GRUBB.

A debt due by judgment and execution levied, is subject to the process of foreign attachment; and the court will stay the execution until appearance.

JUDGMENT, November term, 1846. Fi. fa. issued May 5, 1847, for \$265 62, "levied on goods, &c., per inventory and appraisalment."

On affidavit filed January 2, 1847, that a sum exceeding \$50 was due from Harvey Belcher, a non-resident, to Wm. Amor, a foreign attachment was issued to May term, 1847, and laid in the hands of the defendant, Adam Grubb, on the same day. The garnishee appeared May 13, 1847, and answered, that at the time of attachment laid, he was indebted to Harvey Belcher for a judgment obtained against him at suit of said H. B., at the last November term; amount to be ascertained by the prothonotary, and which amount was ascertained on the 5th of May, 1847, to be \$265 62, debt and interest, on which an execution fi. fa. issued the same day, and was levied on the garnishee's goods, &c., to the amount; but said goods have not been sold, and said amount is still (otherwise) due and unpaid. After this answer was made, *Patterson*, for the defendant in this exe-

cution, obtained a rule to show cause why this fi. fa. and levy should not be set aside.

Wales, showed for cause, that a debt due by judgment on which a fi. fa. has issued, could not be attached. After judgment against Grubb, and a fi. fa. levied, his goods were in the sheriff's hands, and the court would not allow a third person to interfere and arrest the execution process, unless on some allegation that the judgment has been paid. Money in the sheriff's hands cannot be attached.

The attaching creditor in this case has no judgment which he can claim to set-off against this execution; nor any right to disturb the process in the sheriff's hands.

Patterson.—The policy of our attachment law is to compel an appearance by arresting the payment of the defendant's debts by attachment, as well as by seizing his goods. A judgment debt as well as any other is attachable. (*Dig. 46.*)

I agree that money cannot be attached in the hands of a sheriff, for that would produce confusion and embarrassment in the administration of justice. The attachment law is a remedial law, and should be construed in extension of the remedy. (*Sergt. Attachments 80-1; 2 Dall. 277; 8 Gill & Johns. 421.*)

Wales.—Shall the plaintiff in an execution for \$265 62, and interest, have his process arrested, and his judgment stand still, powerless, because his debtor has sworn that he is indebted to a third person in a sum exceeding \$50, and attached the whole debt in his own hands? It does not appear that anything is due from Harvey Belcher to Wm. Amor. And must the whole of this debt be locked up until the trial term of the attachment? Can the court direct an issue; and how?

By the Court.—The object of the attachment will be answered, and this motion avoided by an appearance. The plaintiff in the execution is a non-resident, and owes one of our citizens more than \$50, as appears by an affidavit at the suit of Wm. Amor; who issues a foreign attachment to compel Mr. Belcher to appear and answer his claim; and as the only mode of securing that appearance, he attaches the debt due to Belcher from Grubb, which debt is within our jurisdiction, and recoverable only by the aid of our process. Is there anything unreasonable in staying the use of our process, for such a purpose, until Belcher appears to Amor's suit? If Belcher had property here, real or personal, we would attach it, and if necessary, sell it to compel an appearance; and why not attach his credits as well as other property? And why not attach his credits as well as other property?

form of judgment or execution, as well as other choses in action? We cannot perceive any reason why Mr. Belcher shall be permitted to use the process of law to collect his debts here, while he refuses to appear to sworn demands against him; nor any reason why his credits shall not be attached as well as other property. The attachment law extends to "goods and chattels, rights and credits, lands and tenements in whose hands or possession soever they may be."

It is ordered that proceedings on this *fi. fa.* be stayed until the attachment be dissolved; and, on the exhibition of Amor's cause of action, the bail in that case is reduced to \$200.

Wales, for plaintiff.

Patterson, for defendant.



SAMUEL HATFIELD vs. JOSEPH E. PERRY.

Mode of certifying depositions and referring to papers proved therein.
Book entries when evidence; and for what purpose.
Entries by a notary, are evidence of demand and notice; but the notary must be called, if living.
The mere certificate of a notary, of a protest, is not sufficient evidence.
It seems, that a witness whose deposition has been read, may be afterwards called to testify as to matters not embraced in his deposition, though included in the issues.

MAY term, 1847. This was an action on the case to recover the amount of three promissory notes, two dated Newark, July 27, 1842, for \$461 39, at five months, and \$299 93, at seven months respectively, drawn by Joseph E. Perry, in favor of Samuel Hatfield, or order, payable at the Western Bank of Philadelphia; a note dated October 27, 1842, drawn by the same, payable at the Bank of Chester County, for \$200, at sixty days: a balance on account for goods sold and delivered, amounting to \$193 61, and a balance of rent for a certain paper mill, of \$125.

The pleas were non assumpsit; payment; want of consideration for the notes, and fraud.

The defence set up in relation to the notes was: 1st. That they were without consideration, being accommodation notes, given by Perry to Hatfield, to enable him to raise funds under circumstances of pressure. 2d. That the evidence of presentment and protest of the notes was not sufficient to charge the drawer.

To prove the presentment and protest of the notes, plaintiff offered

certain depositions taken under a commission directed to Samuel L. Clement; and the whole return was objected to: 1st. Because there was no sufficient return by the commissioner of the execution of the commission. 2d. Because the papers referred to in the depositions were not identified by proper marks. 3d. Because all the interrogatories were not answered.

By the Court.—The general certificate of the commissioner that the commission is executed as per schedule annexed, is omitted in this case; but 1st. The introduction to the depositions declares, that “By virtue of a commission to me directed, from the Honorable Superior Court of the State of Delaware, in and for New Castle county, I have caused to come before me, Benj. K. Hatfield and Samuel Badger, witnesses on the part and behalf of the plaintiff,” who being duly sworn and affirmed respectively, “true answers to make to certain interrogatories to the said commission attached, depose and answer as follows, to wit.” 2d. The depositions are connected with the commission, notes, certificates of protest, &c., so that they could not be detached without mutilation. 3d. As to the identification of papers referred to in depositions, the usual and proper mode is by the statement of the commissioner, on each paper, that this is the paper referred to by such a witness in his answer to such an interrogatory, adding his signature, or initials, with a mark by number or letter; with such identification the paper may be handed to the party to whom it belongs, who may not choose to risk its attachment to the commission, and if produced at the trial these indorsements identify it with the paper mentioned in the depositions. But here the papers referred to are attached and made a part of the depositions; they are marked by letters, and described by such marks and other descriptions in the answers as to leave no doubt of their identity.

As to the objection that the fourth interrogatory is not answered, it appears by the certificate of the commissioner that it could not be answered. The interrogatory directs the witness to look on a certain paper, marked in a certain way, and say if the signature is not in the handwriting of a certain person. The commissioner says the paper was not produced, and he therefore, omits the answer, which could be no other than his own statement. Depositions admitted.

The proof of the presentment and protest of the notes was objected to.

The proof was: 1st. The notes with the notary's certificate of

presentment, demand, refusal, and protest. 2d. The deposition of S. Badger, notary, stating that the notes were presented at the place of payment, by Edward Barton, his clerk. 3d. The deposition of Edward Barton stated, "I have no doubt but I presented the notes at the Western Bank of Philadelphia, for payment, when they severally became due. By referring to the book of protests belonging to Samuel Badger, Esq., to whom I was then a clerk, I find that I have returned that the said notes were not paid on my demand, and that payment was refused at the bank by its officers. The signature signed to each of the certificates marked C. and D., is in the handwriting of Samuel Badger, and the seal is his seal as a notary public. The certificates contain the answer made by the officers of the bank when the said notes were severally presented for payment by me."

The Court.—The certificates of presentment, demand, and refusal, would not in themselves be evidence of these facts; but the notary and his clerk have been examined on commission, and the clerk's deposition so refers to, and incorporates, these certificates, as to make it necessary to refer to them as a part of his answers.

The clerk's reference to the notarial book must be admitted also from necessity, as a memorandum made at the time for the purpose of evidence, by a person, and on a subject which make the admission of such evidence necessary, as the memory of a notary in full business could not retain recollection of such matters.

Entries made in books in the course of official duty, or in the course of professional employment, are admissible in evidence in regard to those matters, which it was the duty or the business of the party to do.

Therefore, entries made in the ordinary course of business in the books of a notary public, are admissible to prove a demand of payment from the maker, and notice to the indorser of a promissory note. (*Nichols vs. Webb*, 8 Wheat. 328; *Welch vs. Barrett*, 15 Mass. Rep. 380; *Poole vs. Dicas*, 1 Bing. N. C. 649; *Halliday vs. Martinell*, 20 Johns. 168; *Butler vs. Wright*, 2 Wend. 369; *Hart vs. Williams*, 2 Wend. 513; *Nichols vs. Goldsmith*, 7 Wend. 160.)

If the notary is living and competent to testify, it is deemed necessary to produce him. (8 Wheat. 326.) But if he is called as a witness to the fact, the entry of it is not thereby excluded. It is still an independent and original circumstance to be weighed with others, whether it goes to corroborate or to impeach the testimony of the witness, who made it.

From the above principle, the fair deduction is, that in no case

can the certificate of the protest made by a notary public of a promissory note be admissible. The notary himself must be called, or his books be produced, and not his certificate.

In reply to certain evidence adduced by the defendant under the plea of fraud, plaintiff called one of the witnesses who had been examined on commission. He was objected to because his deposition had been already read in evidence by the plaintiff.

Mr. Rodney, insisted that he had a right to examine the witness, not as to matters mentioned in the original examination, as to which his deposition had been taken, but only in reply to the defendant's evidence.

Mr. Rogers, replied, that the matter of fraud was raised by the pleadings, and open to examination in chief originally. He said that that a witness whose deposition had been read in a cause, could not be afterwards examined, orally, in the same cause.

The court called for his authority, saying they thought the practice of examining a witness after reading his deposition was open to great objection, but that they should not feel at liberty to reject such a witness without authority.

Testimony admitted subject to future objection, and to be confined strictly in reply.

Rodney, for plaintiff.

Rogers, for defendant.



THOMAS BABB'S EX'RS. VS JOHN ELLIOTT.

A wife's interest in a recognizance in the Orphans' Court on the acceptance of real estate may be attached for the debt of her husband.

Fl. fa., attachment. Sheriff returns "laid in the hands of Eli B. Talley, January 15, 1847, at 12 o'clock (noon,) and summoned him as garnishee."

Motion to dissolve the attachment on an agreed statement of facts. The real estate of Matilda Babb was valued in the Orphans' Court under the intestate laws, and assigned to Eli B. Talley, who entered into recognizance to pay to the parties entitled their respective shares of the valuation money. Sarah Ann Elliott, wife of John Elliott, the defendant, was one of the heirs at law of Matilda Babb, and entitled

to \$70, as her share of said recognizance. Mrs. Elliott was yet living.

Mr. Whitely moved to dissolve the attachment, and had a rule to show cause.

Whitely.—The indebtedness of Talley arises on a recognizance in the Orphans' Court to pay to the heirs at law of Matilda Babb, of whom Mrs. Elliott is one, their several shares of the valuation of her real estate. Elliott alone, without joining his wife, could not bring any suit on this recognizance to recover the sum due his wife. It is, therefore, not the subject of an attachment.

If the garnishee was compelled to answer and the husband should die after judgment and before execution, he would have to pay it to the wife, and also to the attaching creditor.

The principle is very important; being nothing less than to subject the wife's real estate converted into personality, by proceedings in the Orphans' Court, to which she is no party, to attachment process by the husband's creditors.

An assignment by act of the husband is equivalent to a reduction to possession; but an attachment is the act of a third person, and does not reduce the wife's property into possession. In England, the husband is not allowed to reduce this kind of property into his possession without making a provision for the wife.

Gilpin, contra.—The question is no longer an open one in Delaware, whether a wife's chose in action can be attached for the debt of the husband. There is no difference in this respect between this and any other chose in action. (1 *Harr. Rep.* 442.)

The proceedings and recognizance taken in the Orphans' Court changed the character of this property. It was no longer real estate, but personal; subject to all the law relating to the personal property of the wife. It is the wife's chose in action; like any other money debt due the wife. The husband has the right to discharge it, or collect it, even against the consent of the wife.

The object of the attachment law is to place the attaching creditor in the place of the husband as to this matter, and the attachment binds all his right from the moment of the process laid in the garnishee's hands. Whatever may be the effect of a death between the attachment and answer, or between the answer and judgment, it is enough to say that the attachment secures to the creditor all the rights of the husband.

The Court discharged the rule.

Gilpin, for plaintiff.

Whitely, for defendant.

COURT OF ERRORS AND APPEALS.

JUNE TERM,

1847.

LEVIN PETTYJOHN, d. b. app'l't. *vs.* DANIEL HUDSON, p. b. resp't.

Assumpsit will lie against a constable for money had and received, though he be liable on his bond, and also under the act of 1833.

Writ of error to the Superior Court in Sussex county. (See ante p. 178.) Heard before Johns, jr., Chancellor, Booth, Chief Justice, and Milligan and Hazzard, Associate Judges.

By the Court:

Booth, Chief Justice.—The grounds for reversing the judgment of the Superior Court, as contained in the assignment of errors, and relied on by the counsel of the defendant below, are in substance the three following :

1. That the action of assumpsit for money had and received, cannot be maintained against the defendant below, because the money claimed, was collected by him as a constable of Sussex county, under execution process at the suit of Hudson, the plaintiff below, against one John Lynch : that the only remedy of the plaintiff below was by an action of debt on Pettyjohn's official bond; or by proceeding under a supplement to the act for the recovery of small debts, 8th vol. 265.

2. That the execution against Lynch, was delivered to one Isaac Jefferson, a constable of Sussex county; that he deputed Pettyjohn to levy the execution and collect the money as the agent of Jefferson; that Pettyjohn, as such agent, was liable to Jefferson for the money received, and not to Hudson; and that the only remedy of the latter was against Jefferson, on his official bond as constable.

3. That the declaration exhibits no sufficient cause of action against Pettyjohn for the money collected under the said execution, and alleged to have been received by him, for the use of Hudson.

None of these grounds can be maintained. 1. The declaration is in assumpsit, and consists of seven counts, in each of which a sufficient cause of action is set forth. The first is a *special count*, alledging that the plaintiff below, Daniel Hudson, recovered a judgment before justice Tindall against John Lynch; upon which an execution was issued and delivered to Isaac Jefferson, a constable of Sussex county, who delivered it to Pettyjohn, then also a constable of the same county; that Pettyjohn collected the debt and costs; and, in consideration thereof, expressly promised the plaintiff, Hudson, to pay him the same, &c. There is also a count for money had and received, and a count upon an account stated.

The defendant pleaded, 1st. Non-assumpsit. 2d. Payment to the plaintiff. 3d. Payment to Isaac Jefferson. 4th. A set-off. 5th. The act of limitation. Upon each of these pleas issue was taken; and, upon the trial of the cause, the jury found a verdict for the plaintiff, Hudson. This court is therefore bound to presume, that there was sufficient evidence to sustain the plaintiff's cause of action as set forth in the several counts of his declaration.

The plaintiff below was not bound to sue the defendant in debt on his official bond for the neglect of his duty in not paying over the money collected by him as a constable. The plaintiff might have adopted that remedy, or the remedy prescribed by the act of assembly (8th vol. *Del. Laws* 265,) which gives a summary proceeding against constables for a neglect of duty. But as he did not choose to pursue either of those remedies, he had a right to resort to the action of assumpsit. This form of action is a proper remedy against a sheriff, deputy sheriff, or constable, upon his express promise to pay money collected by him under execution process; or upon the implied promise which the law raises in such case, and in every case where a person receives money which he is under a legal liability to pay to another.

2. There is nothing on the face of this record which shows that Pettyjohn received the amount of the execution as the agent of Jefferson; or that he was liable only to Jefferson; and not to Hudson.

3. The declaration, as already mentioned, exhibits a sufficient cause of action. But supposing, as is alledged by the defendant's counsel, which is by no means admitted, that there is error in the form of action, and that all the counts in the declaration, except the count for money had and received, and on an account stated, are insufficient, the errors are cured after verdict, by the act of assembly (vol. 8, 43,) passed to remedy defects in legal proceedings. By virtue of

that act, this court must presume, that the damages were assessed on the sufficient counts; because, it does not appear from the record, that they were assessed upon any insufficient count; or found for any matter not contained in the count for money had and received, and the count on an account stated.

As no error appears in the record, the judgment of the Superior Court must be affirmed.

Houston and Layton, for appellant.

Cullen, for respondent.



MARK LEWIS, p b. appl't vs. JONATHAN M. HAZEL, d. b. resp'dt.

The transcript of a justice of the peace on appeal, though required to be under seal, is not essential to give jurisdiction to the Superior Court, and the seal may be waived by pleading to an irregular transcript.

Consent cannot give jurisdiction; but may waive any defect or irregularity in process. If advantage be not taken of such irregularity at the earliest period it is a waiver.

JUNE term, 1847. Questions reserved by the Superior Court of Kent county.

The questions arose in the Superior Court on an appeal from the judgment of a justice of the peace, in which appeal the parties had pleaded to issue, and the jury were sworn; when the counsel for the defendant moved to dismiss the appeal for want of a sufficient certificate to the transcript.

The questions reserved were: 1st. Is a transcript "duly certified" for the purpose of entering an appeal in the Superior Court, *by the hand of the justice without a seal?* 2d. If a seal be essential, can advantage be taken by the defendant of the want of such seal, after appearance by him to the appeal, rule on the appellant to declare, pleas filed, jury empanelled and sworn, and plaintiff's testimony closed? 3d. May not the court direct the justice's certificate to the transcript to be amended, by his affixing his seal to it.

[All the judges were present at the hearing, to wit, Johns, jr., Chancellor; Booth, Chief Justice; Harrington, Milligan, and Hazzard, Justices.]

Layton, for defendant.—The case was not regularly in the court below, which had no jurisdiction to try it. The act of assembly requires the appellant to file a "duly certified" transcript, and gives

jurisdiction to the appellate court thereupon; and sec. 40, requires this transcript to be under hand *and seal*. (*Dig. 345, secs. 24, 25, 40; 2 Harr. Rep. 158, 160.*) 2d. The Superior Court had no power to suffer this matter to be amended. It was not a cause "*pending*" in that court; nor was there any thing to amend by. 3d. The pleading to issue was no waiver of any objection to the jurisdiction. It is not in the power of a party, by waiving any right, or by a direct consent, to give a court jurisdiction.

Whenever the court discovers its want of jurisdiction it will dismiss the cause. (*1 Tyler's Rep. 218; 2 Cranch 126; 4 Ibid 46; 4 Cowen's Rep. 80, 540; 5 Ibid 33; 9 Ibid 227, 229.*)

In courts of limited jurisdiction, though not inferior, the facts which are requisite to the jurisdiction must appear on the face of the record. (*2 Bac. Ab. 630; 9 Mod. Rep. 395; 3 Dall. Rep. 382; 4 Ibid 7, 8.*)

Bates and Bates, jr.—At the stage of the proceedings stated in the second question reserved, it is not competent for the respondent to object to this transcript.

The jurisdiction of the Superior Court over the subject matter of causes appealed into that court from justices courts, is perfect whenever the prerequisites required by the act are complied with, so far as the party appealing is required to do them. These prerequisites are: 1st. That the sum in controversy shall exceed \$5 33. 2d. That the appeal shall be taken in fifteen days. 3d. That the party appealing shall enter into security. All other things are merely formal to bring the record up; to bring the parties in; to compel them to plead, and bring on the trial.

Nothing that is essential to the jurisdiction can be dispensed with by the court, or can be waived by the parties; but any thing that relates to the mode of proceeding merely, may be supplied or waived. The argument of the other side is founded on the principle that consent cannot give jurisdiction. In one sense this is true; in another it is not. It is very common to lose an objection, which might properly be taken on a plea in abatement, by pleading over. The true meaning of the maxim is, that no consent can give a court jurisdiction to try a cause, the subject matter of which the court is not invested with jurisdiction over; but where the court has jurisdiction of the cause of action, defects in the initiatory process may be cured, though such process may, in one sense, be essential to the court's jurisdiction. Thus, the court has no jurisdiction to try the cause of a party defendant, without notice to him; and yet, if he appear and

plead he waives this objection to the jurisdiction. (1 *Bouv. Law Dict.* 732, 733; 4 *Mass. Rep.* 590, 591; 3 *Johns. Rep.* 105, 113.)

The doctrine of waiver is, that though a party may have some advantage in the course of the proceeding, he shall be bound to use it at the right time, or he shall be considered as having waived it. (1 *East Rep.* 81.)

The transcript is not in any sense *essential* to the jurisdiction of the Superior Court. The act says, that appeals shall be allowed *of right*. (Sects. 22, 23.) Whenever the party has appealed and given security, the jurisdiction of the court is complete over the case; yet something must be done to bring the parties, and the case, into court; and that is the filing a transcript. Just as in other cases the issuing process is necessary to bring the case into court, though it has jurisdiction independently of this. The Superior Court has jurisdiction of trespasses from the time they are committed, yet they have no power to proceed until this jurisdiction is moved by issuing process, and summoning the defendant. Any objection to the jurisdiction of the court over the matter is fatal; but an objection to the exercise of the jurisdiction from some defect in moving it to action, must be made at the right time, or it is waived.

The object of the appeal is to provide a jury trial in the cases requiring it. It is the *right* of the party on complying with the conditions required of him. Is it likely or reasonable that this right should be left to the pleasure of the magistrate? that he may defeat it by not certifying the transcript properly, or not at all.

On the great principle alone of the *right* to the appeal, the Pennsylvania courts entertain appeals not duly certified by the magistrate. (1 *Ashm. Rep.* 380; 3 *Serg. & Rawle* 364; 6 *Ibid* 549; 2 *Alab. Rep.* 40.)

The act provides that on filing and entering the transcript in a cause, the court shall have jurisdiction thereof. It does not say shall thereupon, or from thenceforth, have jurisdiction. It simply means that the court shall have cognizance; and (in this connection,) that the particular court in which it was filed, (the Supreme Court or Court of Common Pleas having concurrent jurisdiction,) should have the jurisdiction to try this particular cause. Just as in actions of trespass, though both of these courts had jurisdiction of a trespass from the time it was committed, the court in which the suit was brought had the jurisdiction (or cognizance) of the particular case of trespass as between parties to it.

As to the cases cited, the Vermont case was not within the jurisdic-

tion of the court appealed to. One answer applies to all the New York cases. The law of that State requires a bond to be given on the appeal with surety, and for default of such surety declares that "the appeal shall have no effect whatever." The cases are all cases of this kind. They by no means come up to the position that a defect in certifying the record, after a bond was regularly given, would deprive the court of jurisdiction. (2 Rev. Stat. N. York 259.)

If this objection had been taken at the first term, the court would have suffered the justice to put his seal to the transcript. But instead of making the objection then, the defendant pleaded to issue, continued the appellant with his witnesses in court for two terms, and raised the objection only at the close of a trial before the jury. This is a waiver of the objection to any defect in the transcript of the justice.

Layton, in reply.—1st. No amendments have ever been allowed after the jury has been sworn. 2d. *It is the filing a transcript* which gives the Superior Court jurisdiction of appeals from justices of the peace. The mode of taking the appeal, and the filing the transcript is the *act of the party*; and if the certificate is defective, it is the fault of the party, as well as of the magistrate. The magistrate is also liable to him for any negligence on his part. If the appeal be not properly entered, the law says the "appeal shall be abated." That was my motion in the Superior Court.

The cases cited on the other side are cases of waiver of a personal privilege, or favor granted for the ease of the party.

By the Court:

Booth, Chief Justice.—1st. In no case is a transcript from the docket of a justice of the peace, certified under such a seal as is recognized by the common law. An ink-scroll, or flourish of a pen, has been allowed by common usage, as a substitute. The scroll does not, in point of fact, although called a seal, give any authenticity whatever to the transcript. The authentication appears only by the signature of the justice. As his docket entries are treated as records, and copies are, by the act of assembly, to be received in evidence in any court, when certified under the hand and seal of the justice, it was a useless provision to require his seal, unless it was intended as a further authentication than was afforded by the fact of his merely signing his name. A seal according to the common law, has some device, emblem, or inscription, which distinguishes it from other seals; and when required to be affixed to a writing, the impression must be made on wax or wafers. Although the common law has been

departed from in this State, in the case of private instruments which require a seal, by allowing the substitute of a scroll, merely because a party's signature is better known and more easily proved than his seal, the common law ought not to have been departed from in any case, where the authentication of a record of a court or magistrate was required to be under seal. As a scroll or flourish, a vain ceremony at best, is in all cases of records of justices of the peace, substituted for a seal, and in nowise serves to authenticate the transcript, it would be in accordance with common sense to hold that the transcript was sufficiently authenticated by the signature of the justice, without the scroll. But as the Superior Court acting upon the principle of "communis error facit jus," held in the case of *Green vs. Kinney*, 2 *Harr.* 160, that a seal, by which was meant a scroll, was essential to the certificate of a transcript; we follow that decision upon the principle of "stare decisis;" and therefore hold, that the transcript to be duly certified for the purpose of entering an appeal, must be under the hand and seal of the justice.

2d. The respondent's counsel assumes in his argument, that jurisdiction in cases of appeal from justices of the peace, is given to the Superior Court, only by the appellant's delivering to the prothonotary, a transcript of the docket entries certified under the hand and seal of the justice, and the prothonotary's filing the transcript, and setting down the appeal on the docket, as directed by the 24th section of the act for the recovery of small debts. (*Dig.* 343.) It is then argued, that if the transcript is not properly certified, the Superior Court has no jurisdiction over the case; and therefore, although the transcript is perfect in all respects, except that it is without a scroll, or flourish of a pen; all the proceedings before the Superior Court are a nullity: that as consent cannot confer jurisdiction, the defect cannot be cured, and the appeal must therefore be dismissed. If this reasoning be correct, then it follows, that if in any other respect, besides the omission of the justice to make a flourish with his pen, the directions of section 24, *Dig.* 343, 344, are not strictly pursued, as for instance, if the prothonotary omits to file the transcript, or to indorse the time of receiving it, or to enter the appeal on his docket, or the time of filing the transcript, or does not immediately issue a summons to the appellate, to appear and answer to the appeal, or omits it altogether, the appeal must be dismissed; and the right to have a rehearing, expressly secured by the statute to a party who offers before the justice sufficient security to prosecute his appeal with effect, is forever defeated.

The whole of this argument is founded in misconception; and hence the wrong application to this case, of a sound principle of law. By *jurisdiction* is meant, that power which is conferred by law, upon a court, judge, or magistrate, to hear and determine the subject matter in controversy between litigating parties. Jurisdiction is conferred by statute on the Superior Court to hear and determine the subject matter of appeals from justices of the peace; and the transcript of the docket entries of the justice is required to be filed, not to confer jurisdiction, but to enable the court to exercise the jurisdiction conferred by law, that is, to hear and determine the subject matter in controversy. The transcript is for the purpose of giving the court cognizance of the appeal; and in this respect, is in the nature of process requiring a party to appear and answer to a suit where the court possesses original jurisdiction over the subject matter. If the court never had jurisdiction, no consent of parties can give it. Therefore, if an appeal be taken where the statute confers on the court no appellate jurisdiction, the appeal will be dismissed in any stage of the cause. But any irregularity or defect in the process, or other form of proceeding by which cognizance of a case is given to a court of which it possesses original or appellate jurisdiction, may be waived by the party for whose benefit such process or form of proceeding is required. If he does not take advantage of the irregularity or defect at the earliest period, he is considered as having waived it. In the present case, if the respondent chose to avail himself of the want of a scroll to the justice's certificate of the transcript, he was bound to make the objection at the term to which he was summoned to appear, or before he did any act, from which a waiver could be implied. Neglecting to do so; and having pleaded to the declaration and gone to trial, the defect has been waived. It is an admission by him, that the transcript is in proper form; and operates as an estoppel against his alledging otherwise.

The opinion of this court on the first and second questions, renders the consideration of the third unnecessary. It is therefore ordered, that the opinion of this court be certified to the Superior Court in and for Kent county, and that the said court cause judgment to be entered for the appellant for the amount of the verdict, and all costs.

JOHNS, Jr., Chancellor.—1st. Is a transcript of the docket entries, in a case tried before a justice of the peace, duly certified for the purpose of entering an appeal in the Superior Court, the certificate to such transcript being under the hand of the justice, without a

seal? The act of assembly requires the transcript to be furnished by the justice, under hand and seal, and when so certified, makes the same evidence, and duly certified; therefore, without the seal, I consider it not a duly certified transcript for the purpose of entering an appeal.

2d. If it be required by the act, that such transcript should be certified under the seal of the justice, can advantage be taken by the respondent of the want of such seal, after appearance by him to the appeal, rule on appellant to declare, pleas filed, jury empannelled and sworn, and testimony closed?

The act of assembly, (*Dig. Del. Laws*, p. 343, sec. 24,) provides, "It shall be the duty of the party appealing, or his, her or their executors or administrators, to cause the appeal to be entered in the court of law in the county wherein the judgment appealed from shall have been given, on or before the first day of the term of such court next after the date of the appeal," and then prescribes the manner of entering the appeal thus, "and for this purpose, to deliver a transcript duly certified of all the docket entries in the case wherein the appeal taken shall have been taken, to the clerk or prothonotary of the court in which the appellant shall elect to enter the appeal." The transcript being duly certified, and the appellant having done what the act makes it his duty to perform, the appeal is then entered.

If the appellant delivers to the prothonotary a paper purporting to be a transcript, and the same not being under the hand and seal of the justice, is filed by the prothonotary, the appeal is not entered, and the case stands precisely as it would if nothing had been done; and the case of appeal not being before the appellate court, necessarily remains a case before the justice, with an appeal taken, but not legally prosecuted. Therefore, the irregularity having occurred by the act of the prothonotary in filing a paper not a transcript, the court adopted their 41st rule, prohibiting the prothonotary from so acting in any future case, and requiring the transcript to be under the hand and seal of the justice. (2 *Harr. Rep.* 160.)

The 25th section of the act of assembly, gives the respondent or appellee his remedy, if the party appealing shall not cause the appeal to be entered in the Supreme Court or Court of Common Pleas, as hereinbefore prescribed, viz., "the appeal shall be abated." Now, if we ascertain where it abates, it decides the question before what tribunal it exists? It is requisite that the evidence of the non-entry, or irregular entry, must be exhibited to the tribunal in which the appeal by law is abated, otherwise, it cannot act upon the case; there-

fore, the act for this purpose, provides in the words immediately after the word abated: "and the certificate of the clerk, and the certificate of the prothonotary, under the hand of the officer, and seal of the court, showing that the appeal has not been *regularly* entered in the court, being made after the first term, and produced to *the justice*, he shall file such certificate, and strike off the appeal." This express legal enactment upon the subject, embraces the case of an irregular entry, as well as that of no entry. Hence, in cases of appeals taken and not regularly entered by a duly certified transcript, delivered to the clerk or prothonotary, as in the act prescribed, it is apparent the case and appeal thereon granted by the justice, remain before him, and are not transferred to the appellate court. The transcript duly certified and delivered to the prothonotary, is the key that unlocks the door of the appellate court, and gives the case legal admission, or legal entry, so as to be entitled to attention and judicial action. Hence, the act provides, after authorizing the justice as I have above stated, to strike off the appeal in obedience to the legal command that "the appeal *shall* be abated," provides; "also, if the party appealing, *after the appeal shall be duly entered*, shall neglect to prosecute the same, &c., there shall be entered an order of court, that the appeal be dismissed, and *the record remitted to the justice from whom the appeal came*, and a judgment that the appellate recover costs against the appellant;" which costs the justice is to add to the original costs before him, &c.

From the preceding legal provisions upon this subject of appeal, the appellate court cannot exercise a power which dispenses with the express legislative enactment upon the subject; nor can the prothonotary, by his act, annul the rule of the court. Then the case only remains to be considered upon the latter branch of the question, which I will now advert to. It relates to the effect of the proceedings in the Superior Court, and whether they deprive the appellate of his right to take advantage of the irregular entry of the appeal. If I am correct in considering the appeal not before the Superior Court, then the jurisdiction being appellate, and the subject matter of appeal and record of the inferior tribunal being not transferred, it appears to me, the party entitled to his remedy before the justice, and having none before the Superior Court, cannot be prejudiced by the proceedings, when by the act of assembly, he is required to wait until after the term of the court expires, before he can apply to the justice to have the appeal abated, and his relief is by the act given in the inferior, and not in the Superior Court; therefore, I conclude the doctrine of waiver cannot be considered applicable to the case.

3d. If a seal be essential as aforesaid, may not the court at such stage of the proceedings, direct the justice's certificate to the transcript, to be amended by his affixing his seal to it? The constitution, art. 6, sec. 16, provides, "in civil causes when pending, the Superior Court shall have the power of directing amendments." In this case, as I do not consider the appeal pending in the Superior Court, it cannot be that the court can with propriety direct the justice to affix his seal. Besides, the act of assembly granting the appeal, having embraced the subject, and prescribed the specific remedy to the party aggrieved, appears to me necessarily to exclude the justice from being liable to any such order from the Superior Court.

Certificate ordered, that judgment be rendered below in favor of the appellant.

Bates and Bates, jr., for plaintiff.

Layton, for defendant.



JAMES ROWLAND *vs.* GEORGE HICKMAN.

A writ of error does not lie to the Court of General Sessions of the Peace and gaol delivery.

This was a writ of error to the Court of General Sessions of the Peace, in and for Sussex county, in a case of petition, order and return laying out a private road.

Mr. Cullen, on the first day of the term, at the June term, 1847, moved the court to quash this writ, on the ground that no writ of error lies by the constitution to the Court of General Sessions.

Mr. Layton opposed the motion, and desired to be heard upon the question.

The Court, unanimously, directed that the writ should be quashed, the same having issued improvidently, and not being given by the constitution.

Layton, for plaintiff in error.

Cullen, for defendant in error.

EDWARD L. RICE vs. JOHN FOSTER.

Law is a rule of conduct prescribed by legislative power for the government of the citizens of a State.

Legislative power in this State is vested in a General Assembly, consisting of a Senate and House of Representatives.

The people have divested themselves of all legislative power, and vested it in this body. They can resume it only in the forms of the constitution, or by revolution.

The General Assembly cannot delegate this power to any other person, or body; not even to the people at large; nor can they make it to depend on the assent or approval of any other.

The citizen is bound to obey the will of the legislature, as prescribed in the written statute. If the statute in itself give no evidence of legislative will, as a rule of conduct, the citizen cannot obey it; if it subject the legislative will to any other will, the citizen is not bound to obey it.

The act of 1847 "authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them," expresses no legislative will on this question; prescribes no rule of conduct for the government of the citizen; and delegates legislative power to the people of each county.

DEBT on a lease. Case stated. The legislature of Delaware by act of the 19th of February, 1847, entitled "An act authorizing the people to decide by ballot, whether the license to retail intoxicating liquors shall be permitted among them," enacted as follows:—

Sec. 1. That on the first Tuesday in April, 1847, the citizens of the several counties in this State, shall decide by their votes whether or not the retailing of intoxicating liquors shall be permitted in said counties.

Sec. 2. The officers of the last general election shall, on that day, open a poll at the several election districts, and receive the ballots of qualified voters for "license" or "no license;" and an accurate return of the votes shall be made to the clerk of the Court of General Sessions, to be laid before the judges.

Sec. 3. If at such elections there shall be a majority of votes for "no license" in any or all of the said counties, it shall not at any time thereafter be lawful for any person to retail intoxicating liquors within such county; and it shall not be lawful for the said court to recommend for license any person to keep a tavern or store for the sale of intoxicating liquors within said county; and the retailing intoxicating liquors within the county so voting is declared to be a *nuisance*, and is prohibited, until such decision of the majority of votes shall have been reversed as hereinafter provided.

Sec. 4. If any county, by a majority of votes, shall decide against

retailing intoxicating liquors, it shall be the duty of the judges of the said court in said county, to license "temperance houses" for public accommodation without authority to retail intoxicating liquors, on the same terms and conditions that taverns are now licensed, except for such licenses shall be charged but one-half the sum now charged for licenses for the sale of liquors; and also, upon the recommendation of twelve citizens, to license a sufficient number of store keepers, &c., to sell spirituous liquors, &c., for medicinal and sacramental purposes, and to be used in the arts; the persons so licensed to be sworn, and to give bond as herein provided.

Sec. 5. On application of one-fourth of the legal voters to the Levy Court, to present the question of "license" or "no license" again to the electors, another election shall be held for the same purpose, and in the same manner, on the first Tuesday in April next succeeding.

Sec. 6. If there shall be a majority of votes for "no license" in any county, it shall be an indictable misdemeanor for any person to sell liquor in such county contrary to this act.

Sec. 7. If at any such election there shall be a majority of votes for "license," then the laws now in force regulating the licensing of taverns, &c., shall remain and be in full force as before, so far as respects such county or counties which shall so determine. (10th v. 178.)

In pursuance of this act, elections were held in April, 1847; and certain paper writings purporting to be the returns of said elections were filed in the court, showing a majority of votes in New Castle county *against* license.

The present action was brought for the purpose of trying the constitutionality of this act of assembly. It was an action of debt on a lease, from Rice to Foster, of a tavern house in Wilmington, at a rent of \$700 per annum; subject to a proviso that the rent should be only \$500; "if by the law of this State, the Court of General Sessions have not at the May term, 1847, any lawful authority to recommend to the governor, any person to keep a public house or tavern for the sale of intoxicating liquors within the county of New Castle." One quarter's rent was due and payable, by the terms of the lease, on the 8th of May, 1847: the defendant paid \$125, and refused to pay any more; and this suit was brought for the residue.

The questions arising on the record were submitted to the Superior Court; and were reserved, by order of that court, for hearing before all the judges. The case came up for hearing in the Court of Appeals, consisting of Johns, Jr., Chancellor; Booth, Chief Justice, and

Judges *Harrington, Milligan and Hazzard*, at the June term, 1847; and was argued mainly on the constitutional question, (though objection was also taken to the validity and sufficiency of the election returns,) by *J. A. Bayard, Wales and Clayton*, for the plaintiff; and by *Smithers, Bradford and Layton*, for the defendant.

The plaintiff's counsel made the following points: 1st. That no authentic evidence of the election, and its result, had been presented to the court. 2d. That the act of 1847 was unconstitutional, because it was contrary to the limitations of legislative power necessarily involved in a representative republican form of government.

The people cannot make a law; neither the whole people nor a part of them. All laws must be made by their representatives in general assembly met for deliberation, consultation and judgment; acting under oath, and under the restrictions of the constitution.

The representatives of the people in the legislature, though, in general, bound to respect the will of their constituents, are also bound to exercise their own judgment, and to oppose that will, when it invades individual rights, or violates the principles of the social compact. This is a right of minorities, which it was the object of the constitution to secure.

The general assembly is the depository of legislative power; which is a trust to be executed with judgment and discretion, and cannot be delegated to any other body, or persons.

The act of 1847 delegates legislative power to a majority of the people of a county. The restriction upon the granting of licenses is not imposed by the act itself, but by a vote of the people. It may be repealed, and again revived, without any further action of the legislature, or any expression of legislative will. If it be constitutional thus to legislate on this subject, it is so on all others; and legislative power is thus virtually transferred from the general assembly, where the constitution has placed it, to a portion of the citizens; though it does not exist even in all the citizens.

Legislative power exists as a unit, to be applied to all the people alike who are under the same sovereignty; and a law applicable to a general offence, cannot be limited to a part only. The same crime, or offence, cannot be punished differently in the different counties.

The act in question is unconstitutional as a revenue bill; and, also, as conflicting with the clause that requires all elections to be free and equal; because it seeks to bind all the people by the vote of a majority of the people of one county only.

The constitution in no case authorizes an election for any other purpose than the choice of agents, who, as depositories of the sovereign power in its several branches, are to administer the government; and the legislature has no authority to call the elective franchise into action for any purpose not designated by the constitution.

Original and ultimate sovereignty is in the people; yet it is never exercised by them collectively, but only through agents of their selection. The purpose of elections is to choose such agents.

The defendant's counsel argued: 1st. That the election returns, though informal, were sufficient. 2d. That the act of 1847 was constitutional.

It does not delegate legislative power. Legislative power is the power of making laws; not merely voting for or against laws made by others, but of proposing and maturing laws. The legislature passed this law. They expressed the judgment that such a law was beneficial to the community; and they declared the legislative will that such a law should exist, if a certain number, to wit, a majority of the people of either county, should vote in a certain way.

A strong argument in favor of the law is furnished by the practice of similar legislation in the General Government, and of the several States.

The Constitution of the United States was itself subjected by the federal convention to the sanction of Congress, and of the States. The same may be said of most of the State constitutions, which were submitted to a vote of the people.

The ordinance of 1787, for the government of the N. W. Territory, which was subject to the laws of Congress, authorized the governor and judges to report laws which should be in force unless disapproved of by Congress; and this kind of legislation was sustained by the courts. (3 U. S: L. 2074; 5 Wend. 478; 7 Ibid 539.)

The acts authorizing the President to give notice in respect to the joint occupation of Oregon, and for the admission of Texas, on a vote of the people, are of the same character.

The acts of 1809, 1810, repealed the non-intercourse laws on a subsequent event, to be made known by the President's proclamation; and this conditional mode of legislation was sustained by the Supreme Court, in the case of *The Aurora vs. The United States*, 7 Cranch 382; 3 St. Pa. 297. The act now in question is on the same principle.

Under the Constitution of the United States no new State can be formed by dividing a State without the consent of its legislature; yet the State of Maine was formed of Massachusetts territory on a law

of that State submitting the question to the people of Maine. The constitution of Maine is not unconstitutional. (*Const. U. S., Art. 4; 4 U. S. L. 211, ch. 195; 2 Mass. L. 504.*)

Similar laws have been passed in other States, and in our own. (13 Conn. Rep. 120; *Laws Kenty.* 1842; 4 *B. & Mun. Rep.* 146-49; *M. & Per. Dig.* 566; 24 *Pick.* 359; 12 *Ibid.* 184; 7 *Cow.* 349, 585; 2 *Overton* 171; 2 *Yeates* 493; 2 *Marshall* 483; *Laws Mich.* 1845, ch. 46; *Laws Vermt.* 1846, ch. 24; *Laws Ohio* 1847, p. 131, *Laws of N. York* 1845, p. 322; *Laws of Penna.* 1846, p. 348; *Laws of N. Car.* 49, ch. 36; *Laws of Del.* 8 vol. 21, 24; 3 *Harr. Rep.* 385; *Dig.* 493; 3 *Kent Com.* 278; 13 *Wend.* 335; 9 *Del. Laws* 284, 527.)

The act for the establishment of free schools, sec. 5; and the supplement to the Wilmington city charter; and also the act for the removal of the seat of justice from New Castle; and the act authorizing school district No. 18, Kent county, to lay taxes by vote, are all on the same principle. So, also, the laws authorizing the Levy Court to lay taxes, to accept roads, &c., &c.

The law of 1847, is not objectionable on either of the other grounds mentioned.

Examples of legislation for a single county or district are frequent, and often requisite to meet the condition of such county or district. This is peculiarly so as to nuisances; and the sale of liquor is declared in this act to be a nuisance.

The provision for the freedom and equality of elections has no reference to, or bearing on this question; and there is nothing in the constitution to prevent a ballot on an abstract question, as well as on the election of officers.

This is not a revenue bill; but a mere police arrangement to restrain the sale of liquor. The revenue raised by it is merely incidental.

The plaintiff's counsel replied, that the framing of constitutions or organic laws, where no constitution existed before, was a different thing from passing laws under constitutions which vest legislative power in a particular branch; and that the instances of irregular legislation in other States were of no authority, unless they had been sustained by judicial investigation.

That the argument of the defendants gave to the people at least a veto on the acts of the legislature, which was unconstitutional.

That the legislature had no more power to make their action to depend on the will of the people, than either of the other branches of government; the judiciary, for instance, or the executive.

That such a mode of legislation was dangerous, and a virtual surrender of the power.

And, they maintained, that there was a distinction between this act and the free school law, and other laws with which it had been compared; except the act for removing the seat of justice from New Castle, which was admitted to be liable to the same objection.

The opinion of the Court was delivered by the Chief Justice, who was followed by Judge Harrington, and the Chancellor; the former of whom, with Judge Hazzard, dissented on the first point, viz: the sufficiency of the election returns. On the Constitutional question, the Court were unanimous.

Booth, Chief Justice.—The question arising upon the statement of facts in the case submitted to the court, is, whether the judges of the Court of General Sessions of the Peace and Gaol Delivery have any lawful authority to recommend to the governor of the State, any person or persons to keep an inn, tavern, or public house of entertainment, for the sale of intoxicating liquors, within the county of New Castle.

At a very early period in the history of our colonial government, licenses to keep inns, taverns, and public houses of entertainment, were granted by the governor, upon the recommendation of the judges of the Court of General Sessions of the Peace and Gaol Delivery. Spirituous and vinous liquors were retailed by virtue of this license, although not mentioned in its words. With a few slight modifications, the law on this subject has continued in force to the present time. The legislature of this State at their late session, passed an act on the nineteenth day of February last, authorizing the people in their several counties, on the first Tuesday of April, A. D. 1847, to decide by ballot, whether the retailing of intoxicating liquors should be permitted among them. If a majority of votes polled in any county at such election was for "no license," by the terms of the act, the retailing of intoxicating liquors is prohibited within such county; and the judges of the Court of General Sessions of the Peace and Gaol Delivery have no lawful authority to recommend any person for a license to keep an inn, tavern, or public house of entertainment. If a majority of votes was for "license," the law continues in force, and licenses are to be granted as heretofore.

The question then depends on the validity of the act of the nineteenth of February, 1847; and if valid, on the result of the popular vote in New Castle county, at the election held on the first Tuesday of April last.

Admitting, for the sake of the argument, (but it is denied by a majority of this court,) that the alledged returns are properly authenticated, and afford sufficient legal evidence that a majority of the votes in New Castle county was against licensing the retailing of intoxicating liquors; then the important question which has been argued in this cause arises: whether the act of the nineteenth of February, is unconstitutional.

The proposition that an act of the legislature is not unconstitutional unless it contravenes some express provision of the constitution is, in the opinion of this court, untenable. The nature and spirit of our republican form of government; the purpose for which the constitution was formed, which is to protect life, liberty, reputation and property, and the right of all men to attain objects suitable to their condition without injury by one to another; to secure the impartial administration of justice; and generally, the peace, safety and happiness of society, have established limits to the exercise of legislative power, beyond which it cannot constitutionally pass. An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning; and can have no more obligatory force, than when it opposes some express prohibition contained in that instrument. It is irrational to maintain, that such an act is a law, when it defeats the very object and intention of granting legislative power. Therefore an act, such as that mentioned in the argument, to make a man a judge in his own cause, would not be valid; because it never was the intention of the constitution to vest such power in the legislature, the exercise of which violates the plainest principles of natural justice. So also an act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government. Of this character, it is contended, is the act of the legislature of the nineteenth of February, 1847.

The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the Constitution of the United States, and of the first constitution of this State, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism. Wherever the power of making laws, which is the supreme power in a State, has been

exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker: the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate it by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party, acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of revolutionary France, in the days of her short-lived, misnamed republic, shocked the friends of rational liberty throughout the civilized world. There, in the midst of the most refined and polished nation of Europe, the guillotine dispensed with the forms of law as unmeaning pageants; and under the capricious mandates of popular frenzy, running wild in pursuit of the phantom of a false, licentious liberty, "suspicion filled their prisons, and massacre was their gaol delivery."

In the convention of 1787, which formed the Constitution of the United States, the spirit of insubordination, and the tendency to a democracy in many parts of our country, were viewed as unfavorable auguries in regard both to the adoption of the constitution, and its perpetuity. The members most tenacious of republicanism, were as loud as any in declaiming against the vices of democracy. Mr. Gerry, of Massachusetts, the friend and associate of Mr. Jefferson, thought it "the worst of all political evils." The necessity of guarding against its tendencies, in order to attain stability and permanency in our government, was acknowledged by all. Even the propriety of electing by an immediate vote of the people, the first branch of the national legislature, was seriously questioned by some of the ablest members, and warmest advocates of a republican form of government. Mr. Sherman, of Connecticut, opposed it on the ground

that the people were constantly liable to be misled; and he insisted that the election ought to be by the State legislatures. Mr. Gerry remarked, that "he did not like the election by the people." He said, "the evils we experience, flow from the excess of democracy; the people do not want virtue, but are the dupes of pretended patriots." Mr. Madison, although he considered "the popular election of one branch of the national legislature, as essential to every plan of free government, was an advocate for the policy of refining the popular appointments by successive filtrations." Mr. Edmund Randolph, of Virginia, observed, "that the object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for, against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose." In the debates on the federal constitution in the Virginia convention, Mr. Madison, always the advocate of popular rights, subject to the wholesome restraints of law, remarked, "that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions; and that these in republics, more frequently than any other cause, have produced despotism." "If," he observes, "we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes. If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes may terminate here, in the same fatal effects which they produced in those republics." To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sove reignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority.

The Constitution of the State of Delaware begins by asserting the great principles on which it is founded; and the aim and object of

establishing our form of government. The first article contains a declaration of those inherent rights which belong to every individual in society; of certain restrictions imposed on the legislative, executive, and judicial power; and of the right of the citizens to meet together in an orderly manner, and to apply to persons entrusted with the powers of government, for redress of grievances, or other proper purposes, by petition, remonstrance, and address. Most of the matters mentioned in the first article, are merely declaratory of the doctrines of the common law on the same subjects, formerly affirmed by magna charta, in the year 1215, and afterwards asserted by the bill of rights, in 1688, as the undoubted rights and liberties of the people of that country, whence we have derived our language and literature; the christian religion and the common law. The same article of our constitution concludes with a declaration in the name of the people, that every thing contained in that article is reserved by them, out of the general powers of government thereafter granted. All powers therefore, not reserved, are surrendered by the people to those entrusted with the powers of government, to be exercised only in accordance with the principles and design of the constitution, and the genius of our republican system. The legislative, executive, and judicial powers, compose the sovereign power of a State. The people of the State of Delaware, have vested the legislative power in a General Assembly, consisting of a Senate and House of Representatives; the supreme executive powers of the State in a Governor; and the judicial power in the several Courts mentioned in the sixth article. The sovereign power therefore, of this State, resides with the legislative, executive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so, would be an infraction of the constitution, and a dissolution of the government. Nor can they interfere with the exercise of any part of the sovereign power, except by petition, remonstrance, or address. They have the power to change or alter the constitution; but this can be done only in the mode prescribed by the instrument itself. The attempt to do so in any other mode is revolutionary. And although the people have the power, in conformity with its provisions, to alter the constitution; under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government. It is equally clear, that neither the legislative, executive, nor judicial departments, separately, nor

all combined, can devolve on the people, the exercise of any part of the sovereign power with which each is invested. The assumption of a power to do so, would be usurpation. The department arrogating it, would elevate itself above the constitution; overturn the foundation on which its own authority rests; demolish the whole frame and texture of our republican form of government, and prostrate every thing to the worst species of tyranny and despotism, the ever varying will of an irresponsible multitude. The powers of government are trusts of the highest importance; on the faithful and proper exercise of which, depend the welfare and happiness of society. These trusts must be exercised in strict conformity with the spirit and intention of the constitution, by those with whom they are deposited; and in no case whatever can they be transferred or delegated to any other body or persons; not even to the whole people of the State; and still less to the people of a county. It is a plain proposition of law, that a power, or authority, vested in one or more persons to act for others, involving in its exercise judgment and discretion, is a trust and confidence reposed in the party, which cannot be transferred or delegated. The making of laws is the highest act of sovereignty that can be performed in a free nation; and, therefore, the legislative power may be truly said to be the supreme power of a State. Its exercise requires superior intellectual faculties, improved by study and experience; although it seems to be a common notion with many pretended advocates of popular rights at the present day, that every man is instinctively fitted to be a member of the legislature. If the legislative functions can be transferred or delegated to the people, so can the executive or judicial power. The absurd spectacle of a governor referring it to a popular vote, whether a criminal, convicted of a capital offence, should be pardoned or executed, would be the subject of universal ridicule: and were a court of justice, instead of deciding a case themselves, to direct the prothonotary to enter judgment for the plaintiff, or defendant; according to the popular vote of a county, the community would be disgusted with the folly, injustice, and iniquity of the proceeding. All will admit, that, in such cases, the people are totally incompetent to decide correctly. Equally incompetent are they to exercise with discernment and discretion, collectively, or by means of the ballot-box, the power of legislation; because, under such circumstances, passion and prejudice incapacitate them for deliberation; and the tricks of demagogues, excited feelings, party animosities, and the corrupting influences always brought to bear upon popular elections,

would banish reason, reflection, and judgment. If the delegation of the legislative power of the State to the people of a county, to make laws through the medium of a ballot-box; involving in it an abandonment by the legislature, of the trust reposed in them, which they have sworn to execute with fidelity; does not seem to many persons to be destructive of the constitution, and to lead to all the dangers of a democracy, against which the founders of our government were so anxious to guard; it can be only because it is presented under the specious appearance of a profound deference and devotion to the popular will; and because its destructive tendencies are clouded and obscured by the incense of adulation offered to the majesty of the people.

The question then arises, whether the act of the 19th of February last, transfers or delegates legislative power. If it does, it is unconstitutional.

The legislature at their late session, were urged by numerous petitions signed by a large number of very respectable citizens, to refer it to the people to decide, whether the laws licensing the sale of intoxicating liquors should be repealed. If the members of the legislature, by the convictions of their own judgment, were assured that the sad evils of intemperance flowed from the existence of these laws, it was their duty to repeal them; or to introduce such modifications as might destroy their baneful influence. This course was required of them, although the will of the constituents of many of the members might have been opposed to it. The doctrine of the common law is, that a member of a legislative body, although elected by a particular county or district, is bound, in the performance of his functions, to act not merely for the benefit of his own constituents, but for the whole State. The opinions and will of his constituents ought always to command the most respectful attention; but if clearly opposed to his deliberate judgment, to the principles of the constitution, to the dictates of sound morality, or to the public welfare; as an honest and upright man, he ought not to obey them. *The representative (says Mr. Burke) owes to his constituents, not only his industry, but his judgment; and he betrays, instead of serving them, if he sacrifices it to their opinions.* Our legislature, acting with the best intentions, and following the precedents set by the legislatures of other States, the constitutionality of which had never been brought to the test of a legal decision,* declined the responsibility which it was their duty to

* The Supreme Court of Pennsylvania, whose legislation on this subject was followed, has since decided the Pennsylvania law to be *unconstitutional*.

assume; and thus devolved the performance of their trust on the people of each county; in order that a majority, on whom no responsibility rested, might decide a question, which none had the authority to decide, but the legislature.

The laws licensing the sale of spirituous and vinous liquors are valid laws; and must remain in full force, until repealed or modified by the regular and constitutional exercise of the legislative power; by a law passed by the Senate and House of Representatives, in General Assembly met. No such law has been, or was intended to be passed by the legislature. They purposely avoided it. They merely left the subject to the people of each county to decide by ballot, whether the license laws should be repealed or not, within such county; and until such decision should be made by a majority of the legal voters, the laws were to remain in full force. The people of each county were to act on the subject, and not the legislature. The license laws were to be repealed in a county, not by the will of the legislature, but by the will of a majority of the citizens who voted in such county, although it might be against the will of a majority of the citizens of the State; by the exercise of legislative power by the people of a county, which could not be done by the people of the State: by a law (falsely so called) enacted and passed through the medium of ballot-boxes, and not by a law enacted by the Senate and House of Representatives of the State of Delaware, in General Assembly. The design and true character of the act of the 19th of February last are, to confer the functions of the legislature of the State upon the people of a county; to give them the means of exercising legislative power, by authorizing them to decide by their votes, whether the retailing of intoxicating liquors should thereafter be lawful in their county.

A law when passed by the legislature, is a complete, positive, and absolute law in itself, deriving its authority from the legislature; and not depending for the enactment of its provisions, upon any other tribunal, body, or persons. It may be limited to expire at a certain period; or not to go into operation until a future time, or the happening of a contingency, or some future event; or until some condition be performed. Of this description, are many of the laws of the general government respecting duties and imposts; and laws of our own State respecting private corporations; which latter are not to operate until some condition be performed, or the assent of the corporators be given; because a private incorporation is a contract between the State and the corporators; and therefore, the legislature

cannot compel persons to become an incorporated body; or against their consent, impair, alter, or repeal the rights and privileges conferred by the charter. All such laws are complete and positive in themselves when they pass from the hands of the legislature, and are not to become laws by the creative power of other persons. But the legislature are invested with no power to pass an act, which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body, by whose will also existing laws are to be repealed, or altered and supplied. The act of the 19th of February, 1847, is of this character. In a legal sense, it is not a law; it is not complete and positive in itself. It is not a rule prescribed by the supreme power of the State to its citizens, enforcing some duty or prohibiting some act; but was to become a rule only when enacted or sanctioned by the popular vote of a county; and then to be a rule prescribed not by the constitutional legislative power of the State, but by the power of the majority in a county over the minority. Excepting the fifth section, the act of February last in effect, is in the nature of a bill prepared and presented by the legislature of the State to the people of each county, to be enacted or rejected by them. It contains in substance three propositions: 1st. That the Court of General Sessions of the Peace and Gaol Delivery shall not recommend any person or persons for licenses to sell intoxicating liquors; that the retailing of them shall be prohibited as a nuisance, except when sold for medicinal or sacramental purposes, or to be used in the arts. 2d. That it shall be the duty of the same court to license a competent number of persons to keep temperance houses without the sale of intoxicating liquors; and a sufficient number of storekeepers, physicians or apothecaries to sell spirituous and vinous liquors for medicinal and sacramental purposes and to be used in the arts; but for no other purposes whatsoever. 3d. That every person or persons who shall sell or deliver any intoxicating liquors except for the purposes before mentioned, shall be liable to indictment, and on conviction be fined in not less than twenty, nor more than one hundred dollars. The people are called upon to decide the matter by ballot, at the usual places of holding elections. On each ballot is to be written or printed the words "*License*" or "*No License*." If there be a majority of votes for "*no license*," the several propositions contained in the act, are by such majority enacted into a law, and the license laws are repealed. If a majority of votes be for "*license*," the propositions are rejected,

and the license laws continue in full force. There is no substantial difference between this, and the case of a bill introduced into either branch of the legislature. In the latter, the bill becomes a law by a majority of the votes of the members of each house: in the former, by a majority of the votes of the people of a county at an election. But the act of the 19th of February, delegates the legislative power of the State to be exercised by the people of each county, not only in a single instance, but year after year. By the 5th section, whenever one-fourth in number of the legal voters at the last preceding election in any county, shall request the Levy Court to present the question of "*License*" or "*No License*" again to the people, it becomes the duty of the Levy Court to give public notice thereof; and the question is to be again decided by ballot on the next succeeding first Tuesday in April; and so on, in every year in which such written request shall be made. By the constitution of this State, the legislative power cannot be called into action oftener than once in every two years, except by the Governor upon extraordinary occasions; and then to be exercised only by a Senate and House of Representatives. But the 5th section of this act, transcending the constitution, authorizes a minority of voters in each county to call into action every year, the legislative power on this subject, to be exercised by the people of such county through a ballot-box; thus, actually annulling the constitution, and subverting our form of government. But although such absurd and pernicious consequences are the result, the section referred to, is strictly in accordance with the principle and intention of the act itself, which proceeds on the assumption, that as legislative power is derived from the people, it may be transferred back to, resumed, and be exercised by them; and that a law which they make in the exercise of such power, is valid and binding. It is a legal maxim, that the same authority and strength which create an obligation, are required to annul or dissolve it: therefore, if such a misnamed law be valid, it cannot be suspended, changed, or repealed, except in the manner in which it was made, and by the same authority; that is, by means of a popular election, and by a majority of persons voting at such election.

But it is argued, that the act of February last, does not transfer or delegate legislative power: that the legislature have the right to pass conditional laws, which are to commence their operation or to be void upon the happening of some future event, or some contingency: that this act is one of that character, and does not differ in principle from several acts of Congress, and statutes of our own State,

whose validity has been affirmed by judicial decisions. By way of illustration, we are referred to the cases of *The Aurora vs. The United States*, 7 *Cranch* 382; 2 *Peters' Cond. Rep.* 540; *Steward vs. Jefferson*, 3 *Harr. Del. Rep.* 335, and *Gray vs. The State of Delaware*, 2 *Harr. Del. Rep.* 76. In the first case it appears, that on the first of March, 1809, Congress passed an act interdicting the commercial intercourse between the United States and Great Britain and France, commonly called the non-intercourse law; which by the nineteenth section, was to continue in force until a certain period, and no longer; that by the fourth section of the act of Congress of the first of May, 1810, on the same subject, it was declared that in case either of those nations should revoke, or modify her edicts, so that they should cease to violate the neutral commerce of the United States, the president should declare the fact by proclamation; and if the other nation should not within three months afterwards, revoke or modify her edicts in like manner, then that certain enumerated sections of the act of the first of March, 1809, should be revived and be in full force so far as related to such nation; and in regard to the nation revoking or modifying her edicts, that the restrictions imposed by the act of the first of May, 1810, should, from the date of such proclamation, cease and be discontinued.

The Supreme Court of the United States decided that the legislature may make the revival of an act depend on a future event, and direct that event to be made known by proclamation; that there was no sufficient reason why it should not exercise its discretion in reviving the act of March 1, 1809, either expressly or conditionally; and that the nineteenth section of that act could not restrict their power of extending its operation without limitation, upon the occurrence of any subsequent combination of events. There is not the slightest resemblance between the law of Congress and the act of our legislature. The non-intercourse law was complete and perfect in itself when it passed from the hands of its makers. The act of May, 1810, declared it should be revived on the happening of a subsequent event, to be made known by the president's proclamation, which operated simply as a rule of evidence, but did not make or enact the law. Had the president been empowered to repeal existing laws and create a new law, by the exercise of his will, and to announce his decision by a proclamation, as the people of New Castle county were empowered to do by the legislature of this State, and to have their decision announced by the returns of an election, there would be an analogy between the two cases. Were it possible to

suppose such an absurdity on the part of Congress, their act would have been declared void, which thus undertook to transfer the legislative power exclusively to the president, and to abrogate the constitution. In the case of *Steward vs. Jefferson*, the Court of Errors and Appeals of this State held, that the supplement to the act for the establishment of free schools, authorizing a tax to be laid in each district by a majority of the school voters in such district, was a constitutional law. It is argued that the power of taxation is legislative power; that this power is delegated by the school law to the voters in each school district authorizing them to raise taxes for the support of their schools; and that the operation of the law so far as regards the tax, depends on the popular vote of the district.

By the law of this State for establishing and supporting free schools, each school district is constituted a corporation with limited powers; the clear income of the school fund is apportioned among the several counties; the share of each county is divided among the several school districts of such county, and an equal portion given to each, as a donation; provided, the voters in such district raise by subscription or tax, in any one year, a sum equal to one-half of such district's share of the school fund. (*Vol. 8, Del. Laws 21.*) But no tax can be levied or assessed in any school district, unless upon a vote by ballot there shall be a majority of votes for the tax. (*Vol. 8, Del. Laws 171.*)

In the distribution of the school fund, the legislature had the right to appropriate an equal portion to each school district, as a donation; and to prescribe as a condition, that before it should be paid, a certain sum should be raised in the district, either by voluntary subscription or by a tax, as should be determined upon by the corporators themselves. No power is granted to them, or to any other persons, to repeal or change any part of the law; nor does its existence or operation depend on the performance of the condition, or in any manner upon the will or acts of the corporators. If the condition be not performed, the defaulting district loses its portion of the fund; which, after a certain period, is appropriated to the support of free schools in the other districts. No ingenuity can discover the shadow of similitude between the act of the 19th of February, 1847, and any part of the school law. To say that the authority given to the school voters—to members of a corporation—to determine whether a tax shall be laid or not, is a grant of legislative power; is an abuse of language. Legislative power is the power of making laws. The making of a law prescribing by what persons, or by

what body, when, and in what manner, taxes shall be laid and collected, is the exercise of legislative power. But the making of a resolution, or order, or the determination or direction, by the persons or body appointed for such purpose by the law, that taxes shall be laid and collected, is simply the execution of an authority granted by statute. The collection of them is the performance of a mere ministerial duty. The imposition of taxes, therefore, by managers of marsh companies and other incorporated bodies, and by the Levy Court of a county, is the execution of an authority granted by the statute which appointed them as the proper persons, or body to carry its provisions into effect; and is not the exercise, in any sense of the term, of legislative power.

The case of *Gray vs. The State of Delaware* (*2 Harr. 76.*) does not announce any such principle as that the legislative power of the State may be delegated; and, although the point was argued, the case does not profess to decide it. The decision is merely that the mayor's court of the city of Wilmington has jurisdiction to try cases of assault and battery. It was not necessary to decide that the mayor's court could try such cases without the intervention of a jury, as it appeared from the record, that the plaintiff in error had submitted himself to that mode of trial. (p. 88.) The argument of the learned judge, which appears in the report of that case, goes only to the extent, that as the general assembly had the right under the fifteenth section of the sixth article of the constitution, to confer on the mayor's court, jurisdiction in cases of assault and battery, either with or without trial by jury; it was not a delegation of the legislative power of the State to enact in the city charter, that the mayor's court should have power to try such cases "with or without trial by jury, as should be provided by the ordinances of the said city."

The granting of an act of incorporation is the exercise of legislative power. To make ordinances for its own government, subject to the control of the legislature, and not inconsistent with the constitution and laws of the State or of the United States, is one of the rights inseparably incident to every corporation aggregate. This is implied by law from the very act of incorporation itself, although the charter may be silent on the subject. With what show of reason then can it be said, that the power, whether expressed in the charter or not, to make ordinances for the management of the local concerns of the corporation, and the government of its members, is a transfer or delegation of the legislative power of the State? Or that it is any thing else than the execution of an authority or trust expressly

or impliedly conferred by the act of incorporation: an act which is a complete law in itself, and not in the power of the corporation, or of any body, or set of men, to change, alter, or abrogate, except the legislature; and deriving all its power and efficiency from that source and no other. The city of Wilmington is a municipal corporation, invested by the express terms of its charter, with power to make ordinances, subject to the control of the legislature, for its own local purposes and the government of the city, which can affect none but those who come within its jurisdiction, or who have assented to them, by themselves or their representatives. An ordinance then is but a law of the city. The making of it is the exercise only of the law making power of the city, and the authority to make it cannot be a delegation of the legislative power of the State. Therefore, when the charter gave to the mayor's court the power to hear and determine assaults and batteries, with or without trial by jury, the mode of trial was properly left to be regulated by an ordinance of the city.

But the defendant's counsel contend, that the act of February, 1847, is valid, because it is merely a conditional act; to take effect upon a contingency, upon the result of a popular election. Admitting it in that sense of the term to be a conditional act, and further, that it is an act perfect and complete in itself, and instead of giving power to the people of a county to repeal, enact, change, and re-enact laws, it expressly repealed the license laws and prohibited the sale of intoxicating liquors in every part of the State; but before it shall go into operation, let us suppose that it is to be submitted to the vote, not of the people of a county, but of the people of the whole State, for their approval or disapproval. If approved by the majority, it is to become a law; if disapproved, it is not to become a law. This presents the case in the most favorable point of view for the defendant. But were such the character of the act, it would as clearly be unconstitutional, as it is in its present form. In the one case, the people of the State are constituted a component part of the legislature: in the other, the legislative power of the State is delegated to the people of a county. In the former case, a new power in legislation is introduced, unknown to the constitution; but which the legislature undertake to grant, by requiring the assent or dissent of the people to the enactment of laws; a power commonly called the *veto power*; and which was expressly refused to the executive, by the convention that formed the constitution. In the latter case, by vesting the law making power in the people, the legislature venture

to introduce a pure democracy, and thus to subvert the constitution of this State, and infringe upon that of the United States, which guarantees to every State, a republican form of government. The very object of having two distinct branches of the legislature, and each to act separately from the other, is, to avoid hasty and precipitate legislation, and the evils arising in single assemblies, from passion, prejudice, party animosities, and the intrigues of demagogues. If the legislature were to pass a bill, not by the action of each house separately, (the course prescribed by the common law,) but by both houses in joint meeting, it would be void. But they assume the power of authorizing the people collectively, not of the State, but of a county, to make a law, which the legislature themselves collectively, cannot make.

It has been argued with much force, that the legislature have no authority to call into action the elective franchise in any other cases, or for any other purposes, than those designated by the constitution: that the peace and harmony of society are not to be invaded, nor the passions of the people excited, by calling them out to vote upon speculative questions of morals or policy: that the meaning of an election and the legitimate object of the ballot-box, is the choice of men to fill public offices, and of representatives to carry out political measures for the interest and welfare of their constituents and the community at large; and that every conceivable case where such an election can be necessary or proper for public purposes, is provided for, by the constitution itself. There is much strength in the argument; and it may be well questioned whether the legislature constitutionally possess such authority. But it is quite certain, that they usurp power when they call on the people to legislate, by the ballot-box. If they can refer one subject, they can refer any other, to popular legislation. There is scarcely a case, where much diversity of sentiment exists, and the people are excited and agitated by the arts and influence of demagogues, that will not be referred to a popular vote. The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the worst evils that can beset a republican government; and the legislation depending upon them, must be as variable, as the passions of the multitude. Each county will have a code of laws different from the others; murder may be punished with death in one; by imprisonment in another; and by a fine in a third: slavery may exist in one, and be abolished in another. The law of to-day will be repealed or altered to-morrow, and every thing be involved in chaos and con-

fusion. The General Assembly will become a body merely to digest and prepare legislative propositions; and their journals a register of bills to be submitted to the people for their enactment. Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary, and excited majorities, will be thrown down; and a pure democracy, "the worst of all political evils," will hold its sway under the hollow and lifeless form of a republican government.

The only check which the constitution interposes to an act of the legislature tending to such consequences, is an independent and upright judiciary. As the act passed on the 19th of February, A. D. 1847, entitled "An act authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them," is repugnant to the principles, spirit, and true intent and meaning of the constitution of this State, and tends to subvert our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void; and that judgment be rendered, by the Superior Court, for the plaintiff.

HARRINGTON, Justice.—Concurring as I do, in the judgment of the Court, as pronounced by the Chief Justice, on the principal question in this cause; I should not add any thing, had I not been particularly referred to as having drawn the opinion in the case of *Welcome-Gray vs. The State of Delaware*. That opinion was not delivered; nor is it published as the opinion of the Court. No judgment was pronounced on the point now brought up. If, therefore, there be any thing in it which the deliberate judgment of this Court does not sanction, it can have no authority here. The Chief Justice has said that there is no conflict between the cases; if there was, I hope I should have candor enough to admit and to correct the error, as I had much rather be right, than to be consistent: but the distinction between that case and this is, I think, striking and obvious.

It is conceded by all that legislative power cannot be delegated. That case assumes that the legislature may pass a conditional law. Both of these propositions are true. The error in the argument is in supposing them to be alternative or inconsistent. Doubtless, the legislature may pass many conditional laws; but there are many conditions that would make such laws improper. A law opening a road,

on condition that the owner of the land over which it passes will give it for that purpose : a law for building a bridge, on condition that individuals will contribute to the cost in certain proportions : a law altering, abridging or enlarging the vested powers of corporations aggregate, subject to the consent of such corporations ; or a law giving to school districts a portion of the school fund, on condition that such districts will raise an equivalent or proportional sum— are all instances of proper conditional legislation ; even though the assent of the corporators in the one case to the change of their charter, or of the district in the other to accept the donation, and comply with its terms, should be signified by a majority vote. These are all good conditions, capable of being performed without in any way interfering with the legislative will. But a law declaring an offence, or providing a punishment, or repealing an existing law, on condition that the Governor, or any other individual, shall assent to it, is as plainly unconstitutional. It is the naked veto power. It substitutes for, or rather adds to, the legislative will, another will which it makes necessary to the *existence* of the law. This is unconstitutional. No one doubts it. No one will pretend that a law with such a condition would be good. Yet what is the difference in principle between that, and the condition of the act of 1847. It “authorizes the people to decide by ballot,” whether a new law of the State shall prevail ; whether an old law of the State shall be repealed—nay; it goes further, and authorizes the people of a county again and again to repeal or re-enact this law at pleasure, without any return to the legislature, or further expression of their will. Is not this plainly substituting the will of the people for the will of the legislature ; is it not in fact, abandoning the power of legislation on the subject ? What is the subject matter of this act ? The policy of permitting any license for the sale of intoxicating liquor. Who can say from this bill what was the judgment of the last legislature on that subject ? The bill, instead of announcing the absolute will of the representatives of the people on this question, gives no intimation of their judgment upon it ; but “authorizes” the people “to decide” whether this new law, or the old law, shall be the law of the land. This fact, apparent on the face of the act, would seem to be conclusive against it. There is no power but the legislature that can make the retailing of liquor an indictable offence, or repeal an existing law ; and the legislature can neither devolve this power upon another, nor call into operation the will or agency of any other power for this purpose. The act in question assumes to do both ; but no man can say from

the law itself, or from the journals of the legislature, whether it was the judgment and will of any member of that body, that the retailing of liquor should be an indictable offence, or that existing laws on that subject should be repealed. Yet it is this judgment and will of the legislature that *is law*; if, therefore, the act give no evidence of legislative will, how can it be a law. Law is a rule of conduct prescribed by legislative power—the result of legislative judgment, and the manifestation of legislative will: this act prescribes no rule, expresses no judgment, manifests no will of the legislature; but leaves it to the judgment and will of the people to “*decide* by ballot whether the license to retail intoxicating liquors shall be permitted among them.” The most that can be possibly claimed for such an act as the expression of legislative will is, that it is *to be* a law, enacted by the legislature, on condition that a majority of the people of one of the counties approves of it. But this is the very condition which has been conceded to be unconstitutional in the case of a bill subject to the approval of the Governor. What is the difference? A law depending for its existence on the approval of one man, is the same in principle with a law depending on the approval of any number of men, or of the whole people. For it is not pretended that any legislative power resides in the people, any more than in the Governor. What difference is there, then, between the two cases?

It is much to be regretted that this provisional mode of legislation could not have been tested on some subject concerning which the public judgment was less likely to be influenced by their wishes than on this question of restraining licenses for the sale of liquor. So ardent are the friends of temperance to push forward their good work, and so many hopes are resting upon this act as an effective auxilliary to these efforts, that the principle of the act is in some danger of being concealed by the anxiety to see it established as law. Nor can any one, considering it as closely as he may, and in the light thrown upon it by argument and authority, entirely divest himself of the imposing weight of a popular vote of a large county in its favor, and the concurring voice of many citizens in all the counties engaged in the great cause which this act was intended to subserve. For myself, I can say with perfect truth, that I have met this question hoping to find it compatible with my duty to sustain the law, and yielding reluctantly at last to a contrary conviction. But these are considerations which are limited by higher obligations; and, when the matter to be considered is the constitutional power of the legislature to pass an act authorizing the people to decide by ballot whether

any thing shall be law or not, it is precisely the same whether the subject of such legislation be the restraint of licenses, the punishment of crime, the descent of property, the protection of life or liberty, or any other subject of public policy. Take for instance the question of slavery. It exists by law. It can be abolished by law. If a majority of the representatives of the people in General Assembly met should pass a law to abolish slavery, the citizens would all be bound by it; because all are represented there, and have agreed to be bound by any law thus made. But if the legislature, instead of passing such a law themselves, should direct an election to be held in each county, and make the existence of slavery in such county to depend on a majority vote, upon what principle could such an act be binding? Even the citizens of the county voting have never consented to be bound by the will of a majority expressed in that form; but what shall we say of the citizens of the other counties who have neither vote nor voice in the decision? It is vain to say they are not interested in the matter, as the law is to operate only in the county voting for it; they are all interested in every question of general policy, and must be directly affected by the result; to say nothing about the absurdity of different rules of conduct existing in the several counties on the same general subject of legislation.

I have said that law is a rule of conduct, prescribed by legislative power, commanding what is right, or prohibiting what is wrong. This is the exact definition given by the highest authorities. It is a *rule*—a certain, positive and known principle of action; a rule *prescribed*—fixed upon, defined, ordered and made known; a rule prescribed by *legislative power*—by that depository of sovereignty, or branch of government, whose province it is to make law. No other can prescribe a rule of conduct for the citizen, or announce a *will* that the citizen is bound to obey. Law is never, in this sense, contingent; it is never subject to the discretion of those whose conduct it is designed govern. It is a *command*; not counsel merely, or advice; it prohibits, and does not persuade. It extends its iron sway over the unwilling as well as the willing, and never asks the consent or ratification of any other than the creative power.

It is true that, in this country, law may be said in one sense to depend on the consent of the citizens; but it is a general consent expressed through their representatives in the act which makes the law, and never depends on subsequent individual approval. The people have agreed to be bound by the judgment and will of their representatives, as expressed in their legislative acts, because all the people are

there represented ; but they have never agreed to be bound by the judgment and will of a majority of the citizens of any county, where they are in no respect represented. Neither have they ever agreed that their representatives should place them in this dilemma. It is the right and the duty of the representatives of the people in legislature assembled to make the law according to their own judgment. In this judgment the people confide ; in this body the people are all represented; and by its judgment, as expressed in the law which it announces, the people are all bound, for the very reason that it is their own act, done by their authorized agents. But when these representatives, by an imperfect legislative act, assume to subject their constituents to the judgment and will of any other body, however numerous ; expressed in any other form, however imposing ; the delegation of such power is unauthorized and invalid, and the execution of it is not an act of legislation but of usurpation, which the citizen is not obliged, and the other departments of government are not at liberty, to obey.

The validity of by-laws of corporations rests on the same principle of consent. They are local in their character ; generally unimportant in their bearing on public interests ; and binding only on the members of the corporation, or strangers who voluntarily place themselves within the corporate jurisdiction. The right of the legislature to bestow on corporations the power of internal regulation ; and the capacity of corporations to receive and exercise such power, even though it involve legislative power within the corporate limits, exist at common law, and are recognized by the constitution. (Art. 2. sec. 17 ; Art. 7, sec. 8.)

The case of *Gray vs. The State* is pressed upon us as a case of conditional legislation. Granted. But the condition was one that might be lawfully performed. And this is the very matter in issue. A law creating an offence, and punishing it, on condition that the governor, or any other individual, or any number of individuals, shall approve of it, is *void* ; because the legislature *cannot* constitutionally confer on any individuals such a power: a law giving the mayor's court of Wilmington power to try assaults and batteries, and leaving it to the judgment of the city council to decide whether the mode of trial shall be by jury, or not, is a *good law* ; because the city council *has* the constitutional power to decide this very matter. The mayor's court is the court of a *corporation*; and the city council is the legislature of the corporation. It has power to regulate the mode of trial in its own court. A municipal corporation in

a State, is a government within a government; having all the powers within the sphere of its action, of any other government, legislative, judicial, and executive. The power to enact by-laws is inherent in such a corporation. It was expressly granted to this corporation in both its charters. "Sec. 5. The members of the council shall constitute the *legislative* body of the said city," with full power to pass laws for the government of the corporation. When, therefore, the jurisdiction of the mayor's court was extended to assaults and batteries by act of assembly, it was very properly left to the *legislature* of this corporation to decide upon the mode of trial; a matter directly within their constitutional power. Now, the question in that case was, whether the city council was a body upon which the legislature could devolve the power of deciding the mode of trial in the mayor's court, and the question is answered by the statement of the case itself. The city council, as the legislature of this corporation, had by common law, and also, by grant, long prior to this act, full power to pass laws for the punishment of certain offences within this city, as well as to regulate the mode of trial; and, the law referred to, only recognized that power in a body which was perfectly capable of executing it. Had the legislature said nothing about the mode of trial, the city council would have had power to regulate it. The act now under consideration does not, therefore, derive any support from the opinion cited, even if that opinion had the force of a decision. Until it can be shown in this case that "a majority of the people" in each county, have the constitutional power "to decide by ballot" whether a new criminal offence shall be created, and an existing law repealed; both of which are acts of the highest legislation; an act of the general assembly "authorizing" them to do so, can find no support by comparison with a law authorizing the legislature of a corporation to perform an ordinary act of legislation, within the scope of its constitutional powers. The people of a county—nay, the people of the State, have no such constitutional power. They parted with it for their own good, when they "vested" it in "a general assembly, to consist of a Senate and House of Representatives;" and it is not in the power of the general assembly to return it to them. Gloomy, indeed, would be the prospect for this, or any other representative republic, if the people themselves should ever withdraw this power from their representatives, to exercise it through the medium of legislative ballot-boxes. All history teaches, not only that this would lead to anarchy and despotism; but that it is itself a state of anarchy. Fortunate it is for us, that our wise and patriotic

ancestors, have interposed between us and such a state, the restraints of the constitution; which neither the judiciary, nor the legislature, nor the people themselves, will ever disregard, when the true principles of the constitution come to be considered, and fully understood.*

The Chancellor.—I concur in the opinion of the court as delivered. It may, perhaps, be expedient for me to present in addition to what has been said there, a brief argument which appears to me decisive upon the question.

The action of power I regard as distinct from the power itself. Law is the result of the legitimate action of legislative power. The people, in the exercise of their sovereign power, make the organic or fundamental law; which, as the constitution of the State, is un-

* The Supreme Court of Pennsylvania has expressed the same views, not only on the general question, but on the particular distinction here contended for. In the case of the borough of West Philadelphia, (5 *Watts & Serg.* 283,) *Chief Justice Gibson*, delivering the opinion of all the court, said—"Under a well-balanced constitution, the legislature can no more delegate its proper function, than can the judiciary. It is on the preservation of the lines which separate the cardinal branches of the government, that the liberties of the citizen depend; for a consolidated sovereignty, in whatever form, is a despotism, in so far as it subjects the governed, not to prescribed rules of action, to which he may safely square his conduct before-hand, but to the unsettled will of the ruling power, which cannot be foreseen; and a government becomes consolidated in proportion as its legislative branch abandons its own functions, or usurps those which have been vested elsewhere. In the very constitution of things, the whole people of a State cannot assemble together to exercise their sovereign power in person; and it is not to be regretted that they cannot, for their rule being untrammelled by any thing but their own will, would be as arbitrary and fitful in its exercise as any other uncontrolled domination. When they delegate it to an undivided agency, they slip their hold on it, and in turn become its slaves. These are considerations to show that the exercise of a doubtful power under the constitution, is not to be extended by implication, even where the lines of demarcation are so fine as to be almost invisible. The legislature may certainly authorize a corporation to enact ordinances and by-laws; for these are not only incidental, but rules of self-government, such as any other individual may prescribe for his own conduct; and it may also authorize voluntary associations to assume corporate powers in specific cases; on the performance of certain conditions, as it has done in the case of associations for literary, charitable, or religious purposes."

alterable, except in the mode it prescribes, or by revolution. The constitution being established by the sovereign power, exists as the expression of that will, and constitutes the agreement or social compact under and in conformity with which the citizens assent to be governed. Hence, the constitution is always held to be the paramount law; and, being the expression of the sovereign will, must necessarily control and invalidate every act of an inferior power when in conflict, or subversive. In the State of Delaware, the constitution has defined and distributed the different powers of government, executive, legislative, and judicial. They are respectively derived from, and exist under the constitution; and, whenever their action would destroy the constitution, it becomes suicidal. The offspring must inevitably perish with the parent; the branches cannot survive the destruction of stock and root. These general principles I apprehend will not be questioned. It is also evident that the powers delegated must not only act in the appropriate sphere, but also, in the legitimate mode or manner essential to effect a valid act. Hence, the legislative power, as it exists under our constitution, cannot depart from the sphere of municipal legislation, except its action conforms to the amendment as prescribed in the constitution itself. In like manner, the action of the legislative power, when exercised in order to produce a valid law, must be in accordance with the mode of action prescribed in the constitution; otherwise, the result cannot be pursuant to the agreement as contained in the social compact; and, therefore, not obligatory on the citizen. To illustrate and explain the principle, I will advert to the constitutional provision relative to the action of the legislative power, and the delegation thereof. In the 2d article of the constitution of the State, sec. 1st, "The legislative power of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives." Sec. 6. "A majority of each house shall constitute a quorum to do business." Sec. 8. "Each house shall keep a journal of its proceedings." Hence, it is obvious the legislative power is vested, not in a single body, but in two—a Senate and House of Representatives; and by sections six and eight, it is manifest the action of each, in the exercise of the power, is required to be several; although no bill can become a law without passing both houses. Thus each is a check on the other; and the constitution, by this provision, has intended protection against hasty and injudicious legislation. Suppose the legislature should resolve to meet in joint session, and as a single body enact laws, thus varying the mode or manner of action of the legislative

power, although the power would exist in the component parts of the body, yet action would be incapable of making a constitutional law. If then the joint action of the body possessing the power separately, cannot, in consequence of the irregular mode of action, make a law, it would seem impossible for the mind of man to imagine any ground capable of sustaining the position, that a law of the State of Delaware can be made by a popular vote that would be constitutional; even should it be by a majority of the votes of all the citizens thereof who were entitled to exercise the right of suffrage. But when it is impossible to find the law making power either in existence or action in the popular vote of a State, it would certainly be useless to expect to find it in a minority, or in a county. Should it be thus abandoned by its depositaries, I hope the spirit and emphatic language of the Delaware constitution, announced by an independent judiciary, will always, with an intelligent people, be found an adequate and sufficient remedy.

Bayard, Wales and Clayton, for plaintiff.

Smithers, Bradford and Layton, for defendant.



LOWDER LAYTON *vs* POLLY BUTLER.

Dower is a right at common law; the right to have it assigned by the Orphans' Court is derived from the act of 1816.

The opinion in *Coulter vs. Holland*, (2 *Harr. Rep.* 334,) is to be so understood.

The statutes of Merton & Westm. 1, have always been in force in this State.

The act of 1816, was made to relieve dower from the encumbrances of the husband. Damages for detention of dower were not recoverable at common law, but were given

by the statute of Merton, from the death of the husband, *as against the heir*.

But as against the alience of the husband damages are recoverable only from the time of demand and refusal.

THIS was a writ of error to the Supreme Court, in and for Sussex county, in an action of dower. The case was heard on appeal at the June term, 1847, before the *Chancellor*, and Judges *Booth, Milligan and Hazzard*. It was argued by *Layton and Bayard*, for plaintiff in error, and by *Cullen and Bates*, for the defendant.

The case below was an action of dower by *Polly Butler* (late *Hammond*,) against *L. Layton*, a purchaser of the land out of which dower was claimed.

The special verdict found that Isaac Hammond on the day of his marriage with defendant, and during coverture, was seized of such an estate of inheritance in the land as he could endow her of, and that being so seized, judgments were recovered against him under which the land was sold in 1821, to L. Layton, to whom a title was made by the sheriff; that Isaac Hammond died November 20, 1830; that afterwards the defendant married Joseph Butler, who is since deceased. The judgment was, that the defendant recover against said Lowder Layton, as well her seizin of one-third part of said lands and tenements, to hold to her in severalty by metes and bounds, as the value of one-third part of said lands from the time of the death of her husband, Isaac Hammond; which the commissioners laid off and assessed accordingly.

The main points of the argument for the plaintiff in error were: 1st. That damages for the detention of dower could not be recovered at common law, nor by the statute of Merton, only where the husband *died seized* of the land; that our dower act of 1816, merely restored this right, it being considered before that act that the widow was deprived of dower by a sale of the land on judgments against the husband.

2d. That damages could be recovered only from the demand, and not from the death of the husband.

For the defendant, the argument was that dower is under our act of 1816, which gives also in satisfaction of rents and profits "reasonable damages;" sufficient to compensate for the loss of the land; which must be from the death of the husband.

The Chief Justice delivered the opinion of the Court.

Booth, Chief Justice.—In this State, the right of a wife to be endowed, for the term of her natural life, of the one-third part of all the real estate, wherof her husband was seized of an estate of inheritance, at any time during the coverture, is a right under the common law; and not derived from any act of assembly. By the first section of the act concerning dower, partition, and waste, contained in the *Dig.* 164, the common law proceedings in the action by writ of dower unde nihil habet, are simplified; and by other acts, in addition to the remedies at law and in equity, dower may be assigned upon petition, by an order of the Orphans' Court. These several acts of the legislature did not create the right of dower; but merely modified in one case, a common law remedy; and gave in the other, an expeditious and summary remedy unknown to the common law. It is said in the reported opinion of the Court of Errors and Appeals,

in the case of Coulter *vs.* Holland, (2 Harr. 334,) that "the right to dower is derived from the act of assembly;" and hence it has been argued, that dower is a right not at common law; but exists only by virtue of our acts of assembly. The expression is to be taken in reference to the matter before the court, and its true meaning ascertained from the context. It is apparent in reading the opinion, that the court only decided, that the right to have dower assigned by the Orphans' Court, was a right derived from the act of assembly; and that the mode in which it was laid off in the case of Coulter *vs.* Holland, was not illegal. But the court did not, nor did they mean to decide, that dower itself existed only by virtue of our acts of assembly, and was not derived from the common law. The statute of Merton, 20 Hen. 3, and the statute of Westminster I, 3 Edward 1, are, and always were in force in this State; and in all cases where the widow was entitled to dower, she might have proceeded for its recovery at law, by the writ of dower *unde nihil habet*; although such action was but seldom used. Prior to the act of 1816, (*Dig.* 167,) it was the common opinion in this State, that the wife's dower was subject to be defeated by the liens or incumbrances of the husband. The rights of his creditors were supposed to be paramount to his widow's right of dower, as well as to the rights of his heirs and devisees. By the act of 1816, the common law was restored, and since then, the wife's dower cannot be barred by the alienation or incumbrances made or suffered by the husband, unless she shall have relinquished her right of dower, by her own voluntary act and deed, in the manner prescribed by the laws of this State.

Dower *unde nihil habet* is a real action in the nature of a writ of right; and therefore, by the common law, no damages were recoverable by the wife for its detention. But by the statute of Merton it was enacted, that where widows are deforced of their dower, and cannot have it *without plea*, they who deforced them of their dower of the lands *whereof their husbands died seized*, shall, upon the recovery thereof by such widows, yield them damages, that is to say; the value of the whole dower, (namely, the one-third of the annual profits of the land) from the death of the husband unto the day that the widow, by the judgment of the court, has recovered seizin of her dower. Where the husband has aliened the lands, no damages can be recovered by the widow against the alienee, without a demand of dower and a refusal; and then, only from the time of making the demand. Where the husband dies seized of the inheritance, as the

possession immediately devolves on the heir, damages may be recovered against him from the time of the husband's death. But according to *Co. Litt.* 32, b., the heir may save himself from damages, if he comes into court upon the summons the first day, and pleads that he has always been ready, and yet is ready to render dower, and prays that she may not have damages; in which case, if the wife has not requested her dower, she loses her damages. But if to the plea, she replies a demand of her dower, and issue is thereupon taken and found for her; she recovers damages from the death of her husband. If the heir succeeds on the issue, he is saved from damages from the time of the husband's death; but still the widow recovers damages from the teste of the original writ; which in law is considered as a demand. So too, in the case of the husband's alienee, damages are given from the time of suing out the writ, although no demand was in fact made. It seems necessary therefore, to entitle the widow to damages, either against the alienee, or the heir, that she should make a demand of her dower previous to bringing her action of dower *unde nihil habet*. By the damages in this action are meant the one-third of the annual profits of the land beyond all reprises, (that is, after deducting land taxes, repairs, &c.,) and also, such damages as the wife has sustained by the detention of her dower, which in the inquisition taken upon a writ of inquiry, are usually assessed severally; although it is said, damages may be given generally, without finding the value of the land.

By the record in this case, it appears that the present suit is an action by writ of dower *unde nihil habet*. The summons is almost in the words of the form of the writ contained in *Chitty's Pleadings*, vol. 3, 1311; and the declaration substantially agrees with the form given in the same volume, p. 1315. The first section of the act of assembly, (*Dig.* 164, 165,) was intended to simplify the proceedings in the common action of dower. Therefore, when it is said that "the defendant shall recover reasonable damages for the detention of her dower," it is to be understood, that damages are to be given, in case of the alienee of the husband, from the time of a demand and refusal; and in the case of the heir, from the time of the death of the husband; unless the heir pleads with success, *tout temps pris*; in which case damages are to be assessed from the time of issuing the writ. The same section also enacts, that the damages shall be a satisfaction of any demand on account of rents and profits; by which it is clearly intended, that the rents and profits, beyond re-

prises, should be included in the damages for the detention of dower; and not be assessed severally, as they would have been, before the passage of the act.

The judgment for dower by metes and bounds, is founded on the common law. The judgment for damages and costs is given by statute. As they are distinct from each other, the former may be affirmed on a writ of error, and the latter reversed. In this case, the return of the freeholders to the Superior Court, in which it appears that damages were assessed from the death of the husband, instead of from the time of issuing the writ, was affirmed by the court, as is usual under our practice, when no objections are made to a return. The judgment rendered by the court below, that the defendant recover damages from the time of the death of the husband, is clearly erroneous, and is therefore reversed; and the judgment, that the defendant recover seizin of her dower, to hold to her in severalty by metes and bounds, as laid off by the freeholders, is affirmed.

Layton and Bayard, for plaintiff.

Cullen and Bates, for defendant.

SUPERIOR COURT.

FALL SESSIONS,

1847.

Memorandum. In the vacation preceding this term the Hon. DAVID HAZZARD, Associate Judge of the Superior Court resigned; and the Hon. EDWARD WOOTTON, of Georgetown, Sussex, was appointed to succeed him. Judge Wootten's commission bears date September, 16, 1847.

THE STATE, use of HAZZARD and wife *vs.* LAYTON and others,
his sureties, (in several suits.)

If the condition of a statutory bond be contrary to the statute, it is void.
But if a part be in pursuance of the statute, and another part otherwise, it will not
avoid the bond altogether, unless the statute so enacts.
The omission of one part of the condition of an official bond will not make it void as
to the other part.

THESE were actions of debt on the defendant's bond as administrator cum testamento annexo of John Wilson, deceased, by the plaintiff and his wife, a child and residuary legatee of John Wilson.

The bond was dated in 1826, and was taken according to the act 24 Geo. 2, (1751,) 1 vol. 284, with condition as therein prescribed, viz: to make an inventory; to well and truly administer the goods "according to law;" to account and pay over the residue to such persons as the register by sentence or decree should appoint: and if any will should afterwards appear, to surrender these letters. The case stood on demurrer; and

Mr. Bayard, for defendants, objected—that the bond taken by the register, on granting administration to the defendant, was not in conformity with the statute, and therefore void; that it was an administration bond such as is required in cases of intestacy, when it ought to have been a testamentary bond; as the declaration showed there

was a will; and administration was granted to the defendant to administer the estate *according to the will*, and not "according to law."

The duty of an administrator is to pay the residue "to such persons as the register by sentence or decree shall appoint;" and, if any will should be discovered, to surrender these letters; but the duty of an executor, or of an administrator, c. t. a., is to pay the residue according to law, *and in pursuance of the will*.

Where a bond is taken in pursuance of authority conferred by statute, and not by common law authority, it must be conformable to the statute or it is void. (*Th. Ray.* 222; *Hob.* 12, 14; *3 Co. 82*, *Twyne's case*; *Cro. Eliz.* 529; *7 T. Rep.* 105; *7 Taunt. Rep.* 28; *1 T. Rep.* 421; *21 C. L. Rep.* 299; *4 East's Rep.* 568; *1 C. L. Rep.* 479; *2 Saund. Rep.* 59, 60, n. 3; *1 Del. L.* 89, 280; *2 Ibid.* 888.)

Mr. Houston, contra, said that a testamentary bond would be further from suiting the case than this bond, which was taken according to law and uniform practice. The different acts of assembly on the subject leave it in doubt what shall be the form of an administration bond with the will annexed; but the best conclusion is, that the act of 24 Geo. 2, (v. 1, 284,) is to govern. And none of the acts avoid bonds not taken in terms precisely conformable to them. The cases cited are under *Stat. 23 Hen. 8*, which (to prevent extortion) declares, that bonds not taken conformable to it shall be void. (*1 Saund. Rep.* 161, n. 1.) Even where the statute so declares, the courts have, to carry out the objects of the act, construed void to mean voidable. (*2 Harr. Rep.* 184, *Luby vs. Cox.*)

The English statute of distributions respects the legal representatives; and a creditor cannot assign as a breach the nonpayment of debts. (*2 Kent Com.* 408; *Amb.* 183; *Coupl.* 140; *1 Wms. Ex'rs.* 362; *8 Barn. & Cres.* 150; *1 Crompt. & Mees.* 890.) This was never the law of Delaware. These bonds are "for the use of all persons concerned;" creditors and legatees as well as next of kin. (*1 v. 93*, *4 v. 46*; *2 v. 890*.) A payment according to law, and according to the will, are the same; as the will is the law of distribution for the case.

Mr. Bayard replied.

By the Court:

Booth, Chief Justice.—The defendant's counsel contends that where a bond is taken by virtue of a statute, and not at common law, in a case where there is no indebtedness, the bond must be taken in conformity with the statute. If it is not, or if it is contrary to the statute, it is absolutely void.

In the present case, the form adopted is that which is prescribed in *the act for the better settling intestates' estates*, (vol. 1, *Del. Laws.* 285,) which was in force when this bond was executed. The condition is word for word with the form, except in these three points: 1. After describing the defendant as administrator, the words "*with copy of the will annexed,*" are inserted. 2. The words "*register for the probate of wills and granting letters of administration,*" are inserted in lieu of the words "*Orphans Court.*" 3. The words "*as the said register by his decree or sentence, pursuant to the true intent and meaning of the laws of the said State, shall limit and appoint,*" are inserted in place of the words "*as the said Orphans' Court, by their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint.*" These variations were necessary; the first, to describe the character of the obligor; and the second and third, to substitute the register for the Orphans Court; because, by the constitution of 1792, the original jurisdiction of that court in settling and adjusting the accounts of executors and administrators, was taken away and vested in the register. In no other respect whatever, does the condition vary from the prescribed form. It is substantially the form required by the English statute of distributions, (22 and 23 *Charles 2.*) The argument on behalf of the defendant is, that the bond is void, because it is in the form set forth in the act contained in vol. 1, 285, in cases of intestacy; that this is a case where the administration was granted with the will annexed, and is not a case of intestacy: that as the deceased left a will, and although the executor renounced, and letters of administration were granted to the defendant, the bond ought to have been taken in the form prescribed by the act, vol. 2, 888, upon the granting of letters testamentary to an executor: that not having been taken according to the latter act, the bond is absolutely void; and that no action can be maintained upon it, either against the defendant, or his sureties.

The condition of the bond on which this suit is founded, is nearly the same in words and substance, with the form of the condition of a testamentary bond. In both cases the obligor is required: 1st. To make a true and perfect inventory of the goods of the deceased, and exhibit the same into the register's office. 2d. To administer well and truly according to law, the said goods, and all other goods that shall come to his hands or possession, or to the hands or possession of any other person for him. 3d. To make a true and just account of his administration. 4th. To distribute and pay the rest and residue of the goods which shall be found remaining upon his

account, in the case of the administrator with the will annexed, "to such person or persons, respectively, as the register by his decree or sentence, pursuant to the true intent and meaning of the laws of this State, shall limit and appoint;" in the case of the testamentary bond, "according to law, and the true intent and meaning of the last will and testament of the deceased." 5th. The administrator, with the will annexed, is required to surrender and deliver up his letters of administration, in case any last will and testament of the deceased afterwards appears, and is approved in the register's office. Excepting this branch of the condition, which is entirely omitted in the form of a testamentary bond; and also, excepting the fourth branch, the condition of each bond is precisely the same. The fifth branch is not without meaning, and is not such an absurdity as is alledged; for it is quite possible, that a subsequent will might be produced and proved; in which case, the letters of administration would be revoked. As respects the fourth branch, there is no substantial difference in the condition of the two bonds. In either case, the distribution of the residue is to be made pursuant to the last will and testament of the deceased; for otherwise, it is not made pursuant to the true intent and meaning of the laws of this State. It is also made under the sentence or decree of the register. The adjustment and settlement of an account, with his order as to the disposal of the balance, constitute what is termed in the language of the late constitution, his sentence or decree. If a further account is to be passed, the order is, that the balance shall be distributed, in case of an intestacy, according to law; in the case of a will, according to the last will and testament of the deceased. It is in this sense, the late constitution of this State uses the term "*sentence or decree,*" in the section which provides, that "*as to the adjusting and settling executors', administrators', and guardians' accounts, the Orphans' Court shall have appellate jurisdiction from the sentence and decree of the register.*"

The condition then of a bond, whether taken according to the form prescribed in the act of 1787, vol. 2, 888, or the form prescribed in the act 24 Geo. 2, vol. 1, 285, is substantially the same. The latter, until the passage of the act of 1829, (*Dig. 220,*) had always been adopted in this State, in all cases of granting letters of administration, whether original, cum testamento annexo, or de bonis non, &c. The act, vol 2, 888, is confined to the case of granting letters testamentary to executors; and gives no authority to take a bond from an administrator with the will annexed. And yet it is argued for

the defendants, that such a bond is void, if not taken under that act, which does not authorize it; and void, if taken under the act, vol. 1, 285. The result, according to this argument, is, that all bonds taken upon granting letters of administration with the will annexed, prior to the year 1829, were null and void. But the practice of taking bonds in all cases of administration is warranted by section four of the act of 1751, vol. 1, 288, which provides, that the register shall continue to grant administration with the will annexed, as used to be done before the passage of the act; and that the last will and testament of the deceased shall be performed and observed in such manner as it should have been, if the act of 1751 had never been made. The only sensible meaning of which is, that distribution shall be made according to the will, and not under the intestate law. The same provision, and in the same words, was contained in an act passed in 1721 (1 vol. *Del. Laws, App'x.* 55,) and in an act passed in 1742 (*App'x.* 62,) which repealed the former act. The act of 1742 was repealed and supplied by the act of 1751. Each of these acts had the same title, to wit: "*An act for the better settling intestates' estates.*" Until the passage of the act (vol. 2, 888) in 1787, it may be said, that executors were not required to give bond; for although an act to that effect was passed in 1749, it was repealed in 1750, vol. 1, 282, sec. 4. Therefore, there was no other form in which a bond in cases of administration, whether original, or cum testamento annexo, or de bonis non, &c., could be taken, than the form prescribed in the acts of 1721, 1742 and 1751, which in each is in precisely the same words.

We cannot accede to the proposition to the extent urged by the counsel for the defendants, that in all cases where a statute requires a bond to be taken, if one part of the condition conforms to the terms of the statute, and another part does not; or if any part required by the statute is omitted, the whole of the bond and condition is void. The correct rule is, that if the condition of the bond is for the performance of a matter contrary to the statute, the bond is void. But if part of the condition is for the performance of the things required by the statute; and another clause or part is for the performance of a thing contrary to the statute; the illegal part does not vitiate that which is legal, but may be rejected as surplusage; unless the statute expressly enacts, that the bond shall be void, if the condition does not conform to the statute, or contains matters contrary to it. And if a statute expressly requires a bond to be given by a public officer, and specifies the terms of the condition, which are cumulative; the

omission of one part of the condition required by the statute does not invalidate the bond so far as the other part operates to bind the party.

The condition of the bond which is the subject of the present suit, is in the same words with the form set forth in the act of 1751, except in the three instances before mentioned, where the variations were rendered necessary by the constitution of 1792. It is also substantially the same with the condition prescribed in the act of 1787. The court, therefore, are unanimously of the opinion, that judgment on the demurrer be given for the plaintiffs.

Houston, for plaintiff.

Bayard, for defendant.



CATHARINE HORSEY'S Lessee vs. NATHANIEL HORSEY.

A married woman's interest in land can be affected only by her private acknowledgment of a deed.

Her covenant to convey will not bind her, and it cannot be pleaded as an estoppel. Ejectment will not lie against a person coming in as tenant, without notice to quit. One coming in as tenant to a tenant for life does not, upon his death, become the tenant of the remainderman, without his assent, express or implied.

OCTOBER term, 1847. Ejectment for a granary, wharf, &c., on the Nanticoke river at Seaford, in defendant's possession.

The land in question was devised by Jacob Kinder to his daughter Catharine Horsey (then the wife of Josiah Horsey) in fee; on condition solely and specially that she should pay the debts and a legacy of \$200 to a grand-daughter, Sally Ann Cannon or her heirs, with interest. The testator also devised other lands in the same way to his two other daughters, the wives, respectively, of Joseph Neall and Nathaniel Horsey. The personal estate was insufficient; and the administrator, c. t. a., of Jacob Kinder, by agreement in writing between him and Joseph Neall, Josiah Horsey and Nathaniel Horsey, sold all the lands devised, and applied the proceeds to the payment of debts; and divided the residue among the devisees. A portion of the land (the part devised to Mrs. Neall,) was purchased at this sale by Nathaniel Horsey, and a deed was duly executed and acknowledged to him for the same, by Joseph Neall and wife, and Josiah Horsey and wife (plaintiff's lessor.) This deed recited the devise; the insufficiency of the personal estate; the unwillingness of the

devisees to accept the land devised charged with the debts; and the agreement authorizing the administrator to sell the land, with covenants for conveyance.

The defence was, 1st. That the plaintiff was estopped by the recitals of this deed from setting up title to the land devised to her. 2d. That the devise to her was conditional and gave no title to the land until the condition was performed, viz: the legacy paid. (*Co. Litt. p. 1, n. a.; 2 Bos. & Pul. 295.*) 3d. That the defendant, who came into possession under Josiah Horsey in his life time, and held over after his death, was a tenant of plaintiff, and entitled to notice to quit. (*Dig. 365-8.*)

Cullen, for plaintiff, cited *Arch. Civ. Pl. 211; 17 Johns. Rep. 167; 1 Wash. C. C. R. 354; 37 C. L. Rep. 287; 8 Mees. & Wel. 208.*)

Saulsbury and Layton, for defendant, cited *5 C. L. Rep. 219; Dig. 89; 1 Greenl. Ev. 26, § 23; 16 Johns. Rep. 109; 3 Harr. Rep. 103; 1 Ibid 110; 6 Cruise 447; 1 Pow. Dev. 183; 2 Ibid 251; Platt Cov. 72.*)

The Court ruled, 1st. That the recitals in the deed to N. Horsey did not estop the plaintiff to claim the land. It amounted to no more than the admission of an agreement of her husband authorizing the administrator to sell the land, and covenanting to convey accordingly. If the agreement had been signed by the plaintiff, it would amount to no more than a letter of attorney for the sale of lands; which a feme covert cannot make; and a covenant to convey that would not bind her. She could part with her title in no other way than by deed acknowledged, with private examination. (*Dig. 89.*)

2d. That the estate vested in Catharine Horsey by the will of her father immediately on his death, and the payment of debts and legacies was a condition subsequent.

3. That if the defendant was the tenant of the plaintiff by any contract or assent of her's amounting to a leasing or an occupation subject to rent, the plaintiff could not bring an action of ejectment without giving the tenant notice to quit; but any disclaimer of the relation, made prior to the demise, dispenses with the notice; and disclaimers subsequent to the demise may be considered in evidence to disprove the tenancy.

4. That a person coming in as a tenant under a tenant for life, does not, upon his death, become the tenant of the person in remainder; without his assent, express or implied.

Verdict for plaintiff.

Cullen, for plaintiff.

Saulsbury and Layton, for defendant.

MANA HILL, Administrator vs. FRANCIS BROWN, Jr.

In a scire facias on a judgment in the Court of Common Pleas, entered upon a transcript from a justice's judgment, the defendant cannot object to the regularity of the justice's judgment, nor go behind the judgment of the court.

THIS was a scire facias on a transcript of a judgment rendered by a justice of the peace, and recorded in the late Court of Common Pleas, to bind lands.

The defendant pleaded among other pleas: 3d. That there was no valid execution issued by the justice of the peace. 4th. Nul tiel record of said execution. 5th. That the transcript from the justice's docket was not entered by the prothonotary pursuant to law. 6th. That the prothonotary did not enter the amount of the judgment, from what time interest accrued, the costs and the names of the parties, plaintiff and defendant, as required by the act of assembly.

Demurrer to 3d, 4th, 5th, and 6th pleas; and joinder.

Cullen.—The object of this pleading is to contradict and avoid the record of a judgment. This is inadmissible. There can be no plea to a judgment invalidating it; nothing which could have been pleaded before judgment. (1 Pet. C. C. Rep. 155, 157; 1 Chit. Plead. 485; 2 Kinne Comp. 19, 20, 479; 3 Cranch Rep. 300; 16 Johns. Rep. 537; 13 Ibid 587; 17 Mass. Rep. 591.)

Layton.—All the cases cited, have reference to collateral proceedings in which no impeachment of the record can be allowed. This is a proceeding by the parties to the judgment; and this is the first opportunity of controverting it. Our pleas do not go beyond the judgment. The entry of judgments on transcript is ex parte. The defendant cannot object until after judgment rendered. He is precluded altogether from defence if he cannot controvert the judgment. It is a judgment rendered without authority or jurisdiction. *Dig.* 342, authorizes the entry of judgment only upon filing the transcript with the prothonotary, and his entering the amount of judgment, when it was rendered, when interest commences, the amount of the costs, and the names of the parties. All these are conditions precedent, and unless these are observed there is no judgment; and I may well plead the want of these pre-requisites. The jurisdiction of the court must appear on the record itself. (2 Bac. Ab. 105; 9 Mod. Rep. 95; 6 East Rep. 600; 3 Dallas Rep. 382; 4 Ibid 8; 1 Cranch Rep. 343; 2 Bac. Ab. 101; 2 Tidd's Prac. 1107, 1158; *Vermont Rep.* 191.)

Court.—The rule is very well settled, that in a scire facias on a judgment, the party defendant cannot plead any thing that contradicts the judgment, or goes beyond it. He can plead nothing to show that the judgment was irregularly entered. He may deny the existence of the judgment, or of such a judgment as is declared on, which is done by the plea of nul tiel record; or he may plead any matter in discharge of it, as payment, accord and satisfaction, &c. But however irregular the judgment, it can be invalidated only by application to the court to set it aside, or on a writ of error.

The act of assembly authorizes the plaintiff in a judgment given by a justice of the peace, after execution issued and returned nulla bona, to file a transcript in the office of the prothonotary, who is required to make certain entries in his judgment docket, upon which it becomes a judgment of this court. To a scire facias on such a judgment, so docketed, the defendant here pleads that there was no execution issued by the justice of the peace; that the proper docket entries were not made by the prothonotary; and other matters invalidating the judgment itself. We think he cannot do this. The judgment cannot be impeached in this way, any more than a judgment on an award could be impeached by pleading to a scire facias that the award was not valid, or the submission irregular; or to a scire facias on a judgment confessed in debt without writ, a plea denying the power of attorney to confess judgment.

Judgment for demurrant.

McFee and Cullen, for plaintiff.

Layton, for defendant.



JOSEPH MORRIS *vs.* JOSEPH R. BARKER.

In the action of slander the defendant's circumstances as to property cannot be given in evidence.

Under the general issue the defendant may prove previous reports of plaintiff's guilt, to reduce the damages, and disprove the malice.

Malice is the gist of the action.

The law implies malice from charges of an indictable character.

OCTOBER term, 1847. This was an action of slander for words.
Plea, not guilty.

Plaintiff proved the slander and offered evidence of the defendant's circumstances. This was objected to, and insisted on; and, after

argument, was ruled out by the court. (2 *Greenl. Evid.* 222, § 269.)

Mr. Cullen, for the defendant, proposed to prove that there were general rumors in the neighborhood that plaintiff had done the act with which he was charged, and that the defendant repeated the rumor innocently, without malice. (3 *Steph. N. P.* 2579; 7 *Com. Law Rep.* 220; 1 *Camp. Rep.* 267-8; 10 *Com. Law Rep.* 321, 2 *Camp. N. P.* 251; 1 *M. & Selw.* 284.)

Robinson, Layton and *Buyard, jr.*, contended that no matter of extenuation or justification could be given in evidence under the plea of not guilty, which puts in issue only the speaking of the words. If words be spoken on a justifiable occasion, it must be pleaded specially. (3 *Com. Law Rep.* 177; 21 *Ibid.* 69, 72; 3 *Harr. Rep.* 377; *Ros. Ev.* 293.)

But the court admitted the evidence, in mitigation of damages, on the authority of *Leicester vs. Walter*, 2 *Camp.* 251; and —— *vs. Moore*, 1 *M. & S.* 284; and it seemed to them reasonable, that although a man may not *justify* the uttering a slander, nor attempt to prove its *truth* upon a plea of not guilty, yet with a view to mitigate the damages and disprove malice, he might show that before the uttering the slander by the defendant, it was generally reported and spoken of by others.

Verdict for plaintiff \$200.

Robinson, Bayard, jr., and *Layton*, for plaintiff.

Cullen and Saulsbury, for defendant.



BURTON R. TUBBS vs. GILBERT LYNCH.

Where land is vacant, and the title, in the State, all occupiers are trespassers; and one cannot maintain trespass against another.

A grant from the State may be presumed on an uninterrupted possession of fifty or sixty years.

Persons occupying vacant land in mixed possession prior to the act of 1843, become tenants in common under that act.

A person petitioning the legislature for a grant of land stated by him to be vacant, and accepting a grant, is *estopped* to deny that it was vacant.

The investigation of a dispute between members of a church, by a committee, according to church regulations, though applied for by both parties, and attended by both, can have no effect on their legal rights, and the award of the committee is not evidence in a court of law.

OCTOBER term, 1847. This was an action of trespass quare clausum fregit, to try the title to seven acres of land, in Baltimore hundred.

After the dispute arose between the parties, who were both members of the Methodist Episcopal Church, the matter was brought before the church by both parties, and a committee was appointed by the preacher in charge, to settle the difficulty. The parties met this committee, who heard the case, and reported in writing. The award was offered in evidence, and objected to.

By the Court.—The object of this proceeding was not to have any binding effect in law on these parties. It was entirely a disciplinary church proceeding. The parties could not choose but submit to it as members of the church. So far from being conclusive against them in a court of law, it was a necessary first step towards a lawsuit; as members of this church cannot go to law with each other until the matter has first been stirred in the church. The action of the church is designed to have a moral, and not a legal result; the penalty of not abiding by it is no other than church discipline; and to give it a legal consequence, or efficacy, would be to compel members of that society to submit their rights to the decision of a church committee, withdrawing them from the legal tribunals of the country. The report itself of this committee, is not binding and final even in the church, but is subject to be revised on application of either party to the church authorities. Evidence rejected.

Houston and *M'Fee*, for defendant, argued that to maintain this suit the plaintiff must show an actual exclusive possession of the premises. The property was a tract of vacant woodland. The title was in the State. Any cutting upon it was a wrong done to the State, not to any individual; neither could any one obtain a title by possession against the State. Nor did the act of 1843 give plaintiff a title, as he was not in exclusive possession.

Where a person is in possession of inclosed land and has the legal title to adjoining uninclosed land, the title draws to it the possession; but not so as to land of which the party has no title. No trespasser could ever obtain such a possession of vacant land as to give him a title against the State, previous to the act of 1843. (*6 Comyn's Dig.* 64; *20 Vin. Abr.* 463-4; *17 Ibid* 216; *2 Saund. Pl. & Ev.* 866; *10 Eng. Com. Law Rep.* 412.) Plaintiff had, therefore, shown no title in himself.

The defendant's title begun by a proprietary grant and survey, dated in 1776, which included this land; but on a resurvey had in 1778, it was by mistake omitted. Though thus thrown out of his resurvey the defendant was in possession under the original survey in 1776, and ever since.

The proprietary warrant and survey of 1776, were offered, and

ruled out, as being inconsistent with the defendant's patent subsequently accepted from the State, and which he was estopped to deny.

The plaintiff exhibited a private act of assembly, passed in 1846, on his petition stating this to be vacant land, and authorizing him to locate it; under which it was surveyed and located, but the title never completed; the defendant having filed a caveat.

Mr. Layton, his counsel, though admitting that where there is a mixed possession, the party cannot recover or defend on such possession merely, insisted that he had proved at least a mixed possession in the whole for thirty years, and an exclusive possession of a part since a division between plaintiff and defendant eight or nine years ago. That a man in the exclusive possession of land, though without title, could maintain trespass against any but the rightful owner. He questioned the cases cited from Comyn and Viner. (2 *Saund. Pl. & Ev.* 866; 8 *East Rep.* 394; 7 *Com. Law Rep.* 203; 4 *B. & Cres.* 574; 6 *D. & Ryd.* 572.) He also contended that the defendant was estopped by an act in pais to deny the plaintiff's possession, having put him in possession eight or nine years ago. (N. Y. *Digest* 877; 3 *Hill's Rep.* 215.) Such a parol partition, though it gave no title to vacant land, bound the parties to it, by estoppel. (4 N. Y. *Dig.* 626; 14 *Wend. Rep.* 619.) And that by the act of 1843, which gives title against the State to persons in possession of vacant land for twenty years; plaintiff was entitled to this land. (9th vol. 454.) For although the possession was mixed for a long time, or even if defendant had the possession, he surrendered it eight years ago, and his possession enured to plaintiff.

The Chief Justice charging the jury stated: 1st. That actual and exclusive possession was necessary to maintain trespass. 2d. That in case of a mixed possession the law adjudges the possession to follow the legal title.

The land in dispute was not covered by the legal title, as exhibited by the papers or documents of either party. It was, therefore, vacant land. In such case both were joint trespassers against the State, and neither could maintain an action against the other. But if the defendant, and those under whom he claims, had been in the uninterrupted enjoyment and possession of this land for upwards of forty or fifty years prior to the year 1836, a grant might be presumed by the jury to have been made by the State. If at that time the defendant agreed to, and did actually establish a line of division with the plaintiff, and put plaintiff in possession to the west of that line, with the liberty of cutting the timber, he had no right to invade that possession.

But if the arrangement and division was broken up by the act of Tubbs, if he treated the whole as vacant land, claiming a mixed possession, then the plaintiff had no right to recover. Both parties were in such case to be considered as tenants in common, and the case came within the third section of the act of 1843. And that the plaintiff was estopped from denying this to be vacant land, by his petition to the legislature in 1845, stating it to be vacant, and the acceptance of a grant from the State.

Verdict for defendant.

Layton, for plaintiff.

Houston and M'Fee, for defendant.



JOHN BOSTON, use of JAMES BRITTINGHAM *vs.* ISAAC BRADLEY'S EX'R.

Construction of the phrase "acknowledgment under the hand of the party of a subsisting demand" in the act of limitation.

It means such acknowledgments as in themselves are a cause of action.

Therefore, if one contracts in writing to deliver goods at market, and to pay over half the proceeds; the cause of action arises from the sale of the goods, and not from the writing; and is barred in three years.

The short entry of the plea of limitation means six or three years, according to the nature of the demand.

In the execution of a commission to take depositions the commissioner need not sign each deposition, if he authenticates the whole.

A commission de bene esse to take the testimony of a witness about to go away, may be executed out of the State, after he has left.

How to take advantage of the act of limitation in case of judgment confessed on a public bond barred at the time of confessing judgment.

OCTOBER term, 1847. This was an action on the case, on a contract in writing, between Boston and Bradley, dated November 7, 1840, and signed by both parties, by which Boston agreed to load defendant's schooner with oysters for New York or New Haven, in good order and clean; the vessel to proceed to market, and the defendant to dispose of the oysters to the best advantage for all concerned, and to have one-half the oysters, or proceeds, after they were sold, for his freight.

The plaintiff declared in assumpsit in several counts, one of them setting out the written contract; averring that the defendant sold the oysters, and did not pay the proceeds; and also the common counts for goods sold and delivered, money had and received, &c., and he

proved a sale of the oysters *more than three years before* the commencement of this action.

The act of limitation was pleaded; and the defendant's counsel moved a nonsuit on the ground that no cause of action had been proved within three years.

Layton, for plaintiff.—The declaration is upon a written contract which comes within the exception to the act of limitation as "an acknowledgment under the hand of the party of a subsisting demand." (*Dig. 397.*) The demand is acknowledged by this writing; and either party may bring suit upon it in *six years*. The violation of a contract is not the "demand," which may exist without a right of action: as in the case of a promissory note not due; the demand exists from the paper, before any cause of action arises.

Cullen and Saulsbury, for defendant.—The right of action accrued on the sale of these oysters by Bradley. That cannot be denied. This suit is for the price of the oysters; the half proceeds of sale. The statute begins to run whenever the right of action accrues, and bars in *three years*, except where the cause of action arises from "an acknowledgment under the hand of the party of a subsisting demand." This paper does not acknowledge a subsisting demand. Nor is it the cause of action. The writing which is excepted out of the mischief of the statute, is a paper which *within itself* contains an acknowledgment of a cause of action.

This is an exception from the statute, and must be replied to the plea of the statute. There is no such replication in this case. Issue is taken on the plea of the act. Without such replication, the plaintiff can have no benefit of the exception, if under any form of pleading it would avail. If this exception can be relied on without replying it, why may not infancy, &c. &c. (*1 Harr. Rep. 51; Ibid. 134; 1 Chit. Plead. 582-3.*)

Bayard, in reply.—This is not one of the savings of the act; these are contained in another section; and, I admit, must be replied. This is an exception out of the statute; and the short plea of limitation is a plea of three years or six, according to the character of the cause of action. The question between us here is, what is the character of this cause of action. Is it one to which the three year limitation is applicable, or the six year? If we are right that our cause of action is "an acknowledgment under the hand of the party of a subsisting demand," the plea of limitation is *actio non accrevit infra sex annos*, and our general replication is right. Who ever heard of replying to such a plea in an action on a promissory note, that the cause

of action is a promissory note, and not barred in three years? The short plea of "limitation" has reference to the cause of action declared on. Any other construction would be to enable a party to use such short pleading for the purpose of entrapping his adversary.

By the Court:

Booth, Chief Justice.—The short pleading cannot be used for any purpose of injustice. The plea must be construed to mean whatever the party pleading it would be obliged to draw it out if required; and it must be taken to have reference to the cause of action declared on. In this case if the cause of action be an acknowledgment under the hand of the party of a subsisting demand, the plea must be taken to be a plea of limitation applicable to such a demand, to wit, six years; and therefore there was no occasion to reply it to the plea.

The statutes of limitation are founded in wisdom and sound policy. They have been termed statutes of repose, and are regarded as highly beneficial. They proceed on the principle, that it is to the interest of the public to discourage the litigation of old or stale demands; and are designed not merely to raise a presumption of payment, but to afford a security against the prosecution of claims, where from lapse of time, the circumstances showing the true nature or state of the transaction, may have been forgotten; or may be incapable of explanation by reason of the uncertainty of human testimony, the death or removal of witnesses, or the loss of receipts, vouchers, or other papers.

The statute of limitation of this State bars the action of assumpsit after the expiration of three years from the time of the accruing of the cause of action. But this limitation does not begin to run in the case of a mutual and running account between the parties, while such account continues open and current: and when the cause of action arises from a promissory note, bill of exchange, or *an acknowledgment under the hand of the party of a subsisting demand*, the action may be commenced at any time within six years from the accruing of the cause of action.

It is insisted by the plaintiff's counsel, that in this case, the act of limitation interposes no bar; because six years have not elapsed from the time of the accruing of the cause of action.

When did the cause of action under this written contract accrue? In November or December, 1840, after the schooner had arrived in New Haven; and when Bradley had sold the oysters, a cause of

action accrued to the plaintiff, to demand his proportion of the proceeds of sale.

It is true, that the right of the plaintiff to sue the defendant, arises from the written contract ; but the plaintiff's cause of action or demand for the proceeds of sale accrues upon the breach of the contract on the part of Bradley; that is, in November or December, 1840 ; and can be established only by parol proof, and not by the production of the written contract. The demand of the plaintiff, therefore, for his proportion of the proceeds of sale, is not shown by any acknowledgment under the hand of Bradley. We recognize the rule laid down by the Court of Errors and Appeals, in *Booth vs. Stockton*, 1 *Harr. Rep.* 55. (a) The acknowledgment in writing under

(a) The following case, on the bar of the statute of limitation in reference to official bonds, decided in Kent, at the October term, 1838, and accidentally omitted from the reports of that term, is considered of sufficient importance now to justify an insertion, though out of place.

State, use of Parker vs. James Whitaker. JUDGMENT d. s. b., confessed October 3, 1835, on bond dated May 2, 1831. Rule to show cause why the judgment should not be struck off, being entered *after* the bond was barred by *limitation*.

The judgment was entered on the official bond of Whitaker, as collector of State taxes, and others, his sureties, conditioned in the usual form for the faithful execution of his office, and for payment to the State treasurer of the amount of his duplicate, (\$860 40,) on or before November 7, 1831. The bond was taken by C. P. Comegys, State treasurer, under the act of February 6, 1829, (*Dig.* 57,) which prescribes the form, and requires a warrant of attorney to confess judgment. The act of limitation of January 30, 1829, (*Dig.* 397,) directs that no action shall be brought upon the official obligation of any collector, after the expiration of *three* years from the *accruing of the cause of such action*.

At the hearing of the rule, the late State treasurer was examined, subject to exception, and proved repeated promises of payment made by the defendant; but this testimony was subsequently ruled out; the witness being responsible for the collector's default; and interested in the result.

A letter was read in evidence from the defendant to the present State treasurer, P. S. Parker, dated May 2, 1835, distinctly admitting the debt, and promising payment.

Huffington, in support of the rule, argued that as the act of limitation barred suits on collector's bonds in three years after the cause of action accrued, this bond was barred, the warrant of attorney void, and the confes-

the hand of the party of a subsisting demand, upon which the action is founded, must in itself establish the plaintiff's claim or cause of action. If it does do so, the action is not barred until after the execution of judgment without authority; and that no subsequent acknowledgment of this debt could legalize the judgment.

Frame, contra, said that the decision made by the Court of Appeals on this defendant's writ of error, (2 *Harr. Rep.* 413,) was a bar to this application; that the act authorizing the collector's bond and warrant was passed after the limitation act, which did not annul the warrant, even though it barred suit; and that this was an application to the equity power of the court to remove an obstruction and let the party into an inequitable defence; and one also, that could not avail him, because in any suit upon the bond, his plea of limitation would be sufficiently answered by the proof of subsequent promises to pay the debt.

Huffington replied that the former trial was only on a part of the case, as against this defendant's sureties, and no bar to this motion; that the court was not at present to regard the defence which might hereafter be set up to an action on this bond; but to say whether any valid judgment had ever been entered on it; whether the warrant of attorney to confess judgment was not necessarily suspended when the bond itself was barred.

Curia advisare vult.

By the Court:

J. M. CLAYTON, Chief Justice.—We do not rest the case on any supposed effect of the mere warrant of attorney as taking the case out of the statute. We think it had no such effect independent of the letter. (See *Clark vs. Figes*, 2 *Stark.* 234.) But, by analogy to the construction put upon every other statute of limitation barring a suit within a given time *after the accruing of the cause of action*, we hold that the cause of action was revived by the new promise; and that the only mode in which the defendant could have taken advantage of the statute here, was to have applied to the court to let him in to plead the statute after the entry of the judgment, and before he had made any new promise to pay it, so as to *cause the action to accrue again* and be restored at the time of the entry. Nothing can be more erroneous than to suppose that such an entry of judgment was absolutely void, because the limitation had run at the time. To establish such a principle would be virtually to overrule all the leading decisions governing these statutes, which are held to be in pari materia, and demanding the same general rule of construction. The statute of limitation admits the cause of action or consideration of the action still existing, and merely discharges the defendant from the remedy, so that a new promise without any other consideration, is sufficient to revive or restore the action; therefore, if the defendant will take advantage of that circumstance it is neces-

piration of six years from the time the right to sue has arisen. But if it is necessary to establish the plaintiff's demand by oral testimony, although there be a written contract, the case is within all

sary he should plead the statute. (*Hodson vs. Harridge*, 2 *Saund. Rep.* 63 a, n. 2.) Hence, the decisions on the statute 21 *Jac.* 1, ch. 16, which contains a general limitation in words similar to this, have settled the principle, that although it clearly appears by the declaration that the debt accrued more than six years before, still the plaintiff can recover; and that in such a case the debtor may plead the statute, or waive the advantage. (*Cro. Car.* 163, 181, 404.) Viewing the case here as if there had been no warrant of attorney annexed to this bond, it is clear that had suit been brought upon it after the time fixed in Whitaker's promise to pay, and before three years had elapsed, as for example, at the time of the entry of the judgment, or when he first applied here to plead the statute, the *declaration* on the bond would not have furnished him with any defence to the action, although it would have stated a cause of action arising more than three years before; and had he pleaded *actio non accredit infra tres annos*, which was his only mode of taking advantage of the statute, that plea would have been fully avoided by the new promise contained in his letter, which revived the remedy, and restored the cause of action. Does then the annexation of a warrant of attorney to confess judgment on the bond, deprive the plaintiff of the benefit of the new promise? If not, why should the judgment be held void after the promise? Is there any equity in driving the State to a new suit on the bond, merely to give the defendant the benefit of the statute of limitation, which we know he had waived at the very time of the entry of the judgment against him? Considering the application as addressed to the equitable discretion of this court, we are at a loss to discover any equity in the defence which it is proposed to set up; and we are well satisfied that in all the cases where the State takes a bond from a public officer for the faithful discharge of his duty, with a warrant of attorney annexed to confess judgment thereon, judgment may be properly entered on such bond notwithstanding the period prescribed by the statute of limitation has run upon the bond, if it can be made appear to the court that at the time of the entry of judgment there was a sufficient promise or acknowledgment of the debt due to save the statute. The State is not excluded from the opportunity of entering its judgment, merely because the time prescribed by the statute has run. It is not to be taken for granted that the public defaulter will plead the statute; but if one should ask leave to do it, he ought, undoubtedly to have leave for that purpose by opening the judgment to let him in to a jury trial, this judgment to stand as a security for what may be recovered in the meantime, unless it clearly appears that his plea would not have availed him when the judgment was entered.

the mischiefs and evils that were intended to be remedied by the statute of limitation, and is barred by that statute.

Our opinion therefore is, that the present suit is not founded on an

The fact does appear from the evidence here, that at the time of the entry of this judgment the defendant had no such defence. Stress was laid in the argument upon the express words of the statute, "No suit shall be brought upon any collector's bond after three years from the accruing of the cause of action, &c.," and it was very properly said by the defendant's counsel, that this was a *suit* on the bond. It was a suit commenced without writ, by virtue of the warrant of attorney, the defendant voluntarily appearing to the plaintiff's declaration, and confessing the judgment in that suit. But the language of this part of the statute is precisely the same with that of other parts, which have always received the same judicial construction, and that is, that suit *may* be commenced, although the time fixed by the statute for it has expired, and although the very record itself discloses that fact. For the law will not presume either that the defendant is entitled to plead it, or that if so entitled he will plead it. It may be, that although the record shows the time has run, yet the cause of action may be saved by some of the exceptions stated in the statute, as by the defendant's absconding or removal from the State "before the expiration of the time allowed by this act for bringing the action;" in which case the act directs that "the time during which such person shall have been out of this State shall, in applying *either of the limitations in this act*, be deducted; and that in every such case, at least one year from the return of such person into this State shall be allowed for bringing such action." The law does not presume at the commencement of a suit that the case may not fall within one of these exceptions, nor does it at any time during the prosecution of it, unless the defendant pleads the statute, and the plaintiff fails to show that the exception protects him against the plea. And so if the declaration state a cause of action arising ten years ago, and there be no plea of the statute, and judgment be entered against the defendant, that judgment cannot be arrested or reversed for error, although it appears on the very face of the record that the time prescribed by the statute for bringing the action had expired before the suit was brought. (See *Blanshard on Limitations* 141-2-3-4, &c.) The reason assigned for this is, that "the statute was made for the case of those who will take advantage of it, and the court will not give a defendant the advantage of it unless he plead it." (*Lee vs. Rogers*, 1 *Levin* 111.) Now, in this very case, if we were to grant the motion what would be the order of the court? why, that the judgment should stand as a security for what might be recovered, but that the defendant should be permitted to plead to the action the act of limitation; that is, that the action did not accrue within three years before the 3d of October, 1835, when the suit was

acknowledgment under the hand of Bradley of a subsisting demand. And not having been commenced until after the expiration of three years from the time of the accruing of the cause of action, it is barred by the statute of limitation.

On this ground the court would order a nonsuit; but the plaintiff insists on going to the jury on evidence of a new promise or acknowledgment, supposed to be contained in the depositions, which the court, after referring to the evidence, think proper to leave to the consideration of the jury.

Certain depositions were offered in evidence, and objected to on the ground that they were not severally signed by the commissioner. There was a general certificate that the commissioner had executed the commission by calling before him the witnesses (naming them) who were duly sworn, and their depositions were annexed and signed by them.

Mr. Bayard said we had no specific rules to be observed in executing commissions, and if the essentials appeared, viz: that the commissioner did what was required of him, and the witnesses were duly sworn and examined, their testimony reduced to writing and signed, and all this certified, it was complete, whether the commissioner signed each deposition or not. The commissioner's name, if written once over a certificate stating every thing necessary, is as good as if signed on each page. Depositions admitted.

The plaintiff now offered the deposition of Wm. Hines, taken by the prothonotary of this court, in the city of New Bedford, in Massa-

instituted in this court, and the judgment entered. The State then would show the acknowledgment of the debt, and the written promise to pay it as disclosed in the letter of the defendant, of the 2d of May, 1835, which revives the cause of action, and the verdict on the issue joined, would thus inevitably be for the plaintiff.

The entry on the record which was made under the order of the court, at the hearing of an application made here for relief by the sureties of the collector, at October term, 1836, (*2 Harr. Rep.* 137,) whereby the Attorney General, in behalf of the State, ordered that execution should be stayed as against the sureties, was not equivalent to a release of the principal. An agreement not to sue, or not to execute, is no release of a debt; and this agreement was not even under seal.

Without relying upon any supposed effect of the decision of the Court of Errors against the defendant in the case before them, we are unanimously of opinion that the rule be discharged with costs.

chusetts, on a rule obtained to take depositions of aged, infirm, or going witnesses.

Mr. Cullen, objected that the prothonotary had no authority to take this deposition under a *de bene esse* rule: but insisted, that for the taking testimony out of the State, the plaintiff was bound to issue a general commission.

Mr. Layton, said the witness was a going witness when the rule was obtained, and was followed to New Bedford by the prothonotary. The witness was here, and was regularly summoned. Fearing he would go to sea, interrogatories were filed, of which the defendant's counsel refused to take short notice, and before the ten days expired the witness had gone off. We directed the prothonotary to follow him to New Bedford; whence he was to go to sea, on a three years' voyage; and finding him there, he took this deposition.

Court.—This is a valid execution of the *de bene* commission. There is nothing in the constitution to restrict the execution of such a commission within the State; though it is taken in reference to persons in the State, and about to leave it. It would be very inconvenient if the authority to take the deposition of a going witness should cease when he got out of the State, if by following or going with him it might be obtained at a place beyond its borders. The authority given to the prothonotary by the rule in this case, was to take the deposition of Wm. Hines as a way-going witness, which he was at the time, being in the State and about to leave; and his deposition was taken at New Bedford by the prothonotary who followed him there for that purpose. There is nothing in the fact that this way-going witness got out of the State before his deposition was taken which should invalidate it. (*2 Harr. Rep.* 487.)

Deposition admitted.



DAVID SMITH *vs.* WILLIAM SMITH'S Executrix.

Scrap of paper admitted in evidence as a book of original entries.

This was an action of assumpsit for work and labor, goods sold and delivered, &c., with a count for use and occupation.

The plaintiff presented several scraps of paper as his book of

original entries; which, though very irregular, the court permitted to go before the jury, he swearing to them as original entries.

The Court said that long practice, and perhaps necessity, required the admission of such evidence. (a)



JOHN D. OUTTEN and wife *vs.* WILLIAM. W. KNOWLES, et al.

The receipt and acquittance of an heir at law, or ward, sealed and acknowledged, is conclusive against him, and cannot be corrected in an action against the administrator or guardian.

THIS was an action of debt on a guardian bond. Pleas, non est factum, payment, &c.

The plaintiffs gave the bond in evidence; the guardian account, showing a balance due the ward, of \$62 71; and proved the sum of \$48 73, received by the guardian, and not accounted for.

(a) *Joshua Hall vs. N. Field and A. Wiltbank.* March 18, 1795, Supreme Court, Sussex. Covenant for the hire and one-third value of the schooner Polly Hall, on charter party of affreightment. *Ridgely and Bayard*, for defendant; *Miller and Wilson*, for plaintiff.

Defendant's counsel offered the book (being a sheet of paper sewed together in octavo,) of one of the defendant's, (Field,) together with his oath in evidence.

Plaintiff's counsel objected that this was not a book regularly and fairly kept; here appears to be only one account; it appearst o have been written all at once, it is agreed that at least many of the charges were written long after the transaction.

Per Curiam. READ, Chief Justice.—The book is to be read. We are under a necessity, considering the irregular practice under the act of assumptions, to admit the book, though not such as that act requires: the practice under an act is the best construction of the act. One instance, thirty years back, occurs to me; since which I have not objected to such exhibits. It was a bit of paper about two inches square and entered sometime after the transaction but was the only eivdence, and it was admitted on argument at Dover. There is a similar act in Pennsylvania, and there a closet door with chalks, &c., was admitted. It appears from the book several of the charges were entered long after the transactions; but the jury will give it its credit. (*Wilson's MS. Rep.* 64.)

Verdict for plaintiff.

The defendants gave in evidence a receipt *under seal*, dated June 3, 1845, for \$63 65, in full, of M. A. Outten's share of her father's estate; acknowledged, and recorded in the register's office.

Robinson and *Saulsbury*, contended that this receipt was not conclusive, and that the guardian accounts showed that this sum of \$48 73, was not accounted for. (1 *Esp. Rep.* 172; 2 *Harr. Rep.* 5, 392.)

Layton, said there was a distinction between an ordinary receipt, and such a receipt as this *under seal*, acknowledged and recorded under the act of assembly, as an acquittance and discharge.

The Court were of this opinion, and held that the receipt under seal was not merely *prima facie* evidence of payment; but was itself a bar, and conclusive. (2 *Saund. Pl. & Ev.* 749; *Gilb. Ev.* 142; 1 *B. & C.* 707; 2 *Taunt.* 141.)

Whereupon the plaintiff suffered a nonsuit.

Robinson and *Saulsbury*, for plaintiffs.

Layton, for defendants.



JOHN JACKSON, Jr. *vs.* ROBERT PATTERSON and GEORGE F. MASON.

A tenant holding under a written lease, continues (without notice to quit) to hold ~~under its terms~~: and if the demise be stated in the avowry, he cannot, under plea of non demisit, prove a different contract by parol.

But if the demise be laid generally he may prove any terms by parol, though the original letting was by deed.

KENT, October term, 1847. This was an action of replevin. The defendant's pleaded non cepit; and the defendant, Patterson, also avowed the taking for rent arrear for three quarter's of a year, commencing on the first of March, and ending on the last day of Nov. 1846, amounting to \$37 50, and the defendant, Mason, made cognizance as Patterson's bailiff. Issue was joined on the plea of non cepit, and to the recognizance and avowry the plaintiff pleaded non demisit, &c.

It was proved that the plaintiff, Jackson, took possession of a house and certain lots in the year 1845, by virtue of a lease under seal from Patterson from March, 1845, to March, 1846, at \$50 per year, payable quarterly for the house, and one-half the produce for the lots;

and that the plaintiff occupied during the year 1846, no notice to quit having been given by either party. The distress was for three quarter's of a year's rent of the house.

The defence was, that the occupation for the year 1846, was under a new agreement. A witness was called to prove that the house was held by the plaintiff in 1846, not under the lease, but under a different contract by parol. He was asked if he had heard the defendant, Patterson, during the year 1846, say on what terms the plaintiff occupied the house in that year. This was objected to.

Comegys.—We have proved a demise of these premises under seal for the year 1845, and that no notice to quit was given by either to the other, but that the tenant held over for the year 1846. The act of assembly provides, that in case of such letting, if three months before the end of the term notice be not given, the tenancy shall continue on the same terms as the first year. (*Dig. 368.*) The effect of the evidence offered is, to contradict a written instrument under seal; which is not admissible.

Bates, jr.—The lease was for 1846. Notice is one mode of putting an end to it, but not the only mode. The terms of the tenancy may be changed by agreement of parties. The effect of the act of assembly is to put it in the power of either party to enforce the provisions of the lease for another year in case notice be not given; but the party may *waive* these terms and enter into a new agreement. If we were to attempt to show a new agreement as to the year for which the lease was made, it would not be admissible, for this would be to contradict the lease; but the proof of a new agreement for another year does not contradict the lease, though there be no notice to quit. It is a waiver of the terms of the old lease and a most effectual mode of putting an end to it.

Bates, sen., cited 3 *Harr. Rep.* 364, and said the objection assumed that it was not in the power of *both* parties to make a new agreement and vary the terms of the lease of 1845, in any other form than by a notice to quit.

By the Court.—The avowry is for three quarters of a year's rent, from the 1st of March to the 30th of Nov. 1846, without specifying under what lease or contract the rent fell due; and the plea is non demisit. Now had the avowry stated that the rent accrued under this lease, the plaintiff could not have controverted its terms by parol under the plea of non demisit, the demise being proved. But the issue here is upon the question of any rent due under any demise, and

it is competent for the parties to show any other agreement than the one which had existed the year previous. A party, though holding under a written lease, may vary it by a new agreement which may be proved, unless where the issues confine them to the specific lease. Evidence admitted.

Verdict for plaintiff.

Bates and Bates, jr., for plaintiff,
Comegys and Layton, for defendants.



JAMES B. COLLINS *vs.* JAMES STEEL.

Sale of land set aside for want of notice of inquisition.

VEND. exponas to the October term, 1847, Kent county. Sheriff returns "land sold to Peter F. Caussey for \$325; and sufficient."

The inquisition was held in this case on a rule in vacation since last term, and the land condemned; upon which this writ issued, and the land was sold.

The defendant, at this term, filed an affidavit that he was, and had been, for many years past, a resident of Kent county; and that he had no notice or knowledge of the holding the inquisition, or of the sale of his property until after the sale; upon which

Bates, jr., had a rule to show cause why the inquisition and sale should not be set aside; and, on the hearing, the affidavit being sustained:—

Rule absolute.



The FARMERS' BANK *vs.* FREDERICK LEONARD.

A sheriff's return of "levied on lands as per inquisition annexed, subject, &c," does not satisfy the judgment though it might make the sheriff liable.

A judgment is presumed to have been paid after twenty years without demand or recognition; if nothing be shown to account for the delay.

The defendant's poverty and insolvency is evidence going to rebut the presumption of payment.

THIS was a scire facias on a judgment recovered in the late Supreme Court, on the 18th of December, 1818, for \$1,410 75. Plea, payment.

The defence rested on lapse of time as evidence of payment; and on proof that the defendant had at different times been in the receipt of considerable means from fees as a magistrate, notary public, lottery commissioner, &c.

Plaintiff, in reply, gave in evidence a number of judgments and executions in 1819-20, and sale of defendant's lands, to show his general insolvency and inability during all the period from 1818 to this time to pay this debt; and offered evidence, also, that he was generally regarded as insolvent.

Huffington, Rogers and Wales, for defendant, contended that there was proof of the defendant's ability to pay; and that the legal presumption of payment arising from the great lapse of time was itself sufficient. This presumption is not so much a presumption of payment, as that the debt has been *released*; and, therefore, the plaintiff is put to his *scire facias* in order that the defendant may have an opportunity to show his release. As to the long list of judgments offered in evidence, they are all of such a standing as that the jury are bound to presume them paid.

The judgment also *by the record* appears to be satisfied. The return on the execution to a prior judgment shows that \$3,400 was levied from the sale of defendant's property; and shows also, a levy upon land; and, as no subsequent disposition of this levy is shown, it is in itself a satisfaction of this judgment: especially when taken in connection with an *acquiescence* and non-claim of the plaintiff for twenty-nine years.

Proof of insolvency is not sufficient to rebut a presumption of payment. (1 *Camp. R.* 217; 13 *Johns. R.* 538; 1 *Tenn. R.* 63; 7 *Johns. R.* 556; 4 *Burr. R.* 963; 2 *Southard's Rep.* 727.) A man is not to be considered insolvent because he cannot at once pay all his debts; many solvent men cannot do this, though they might pay the several claims as presented.

Bradford and Bayard, contra.—A return of "levied on land, subject, &c," is not of itself a legal satisfaction of the judgment. The question of laches does not depend on the ability of the defendant to pay voluntarily, but on the question whether he could have been compelled to pay by legal process.

The presumption of payment arises in twenty years where nothing exists to prevent it. Circumstances rebutting the presumption, are acknowledgments, payments, insolvency, &c. Any circumstances which reasonably prevent the presumption arising, though new in the case, subject it to the same law. Less than twenty years, with cor-

roborating facts, will be sufficient to leave to a jury to find payment upon: twenty years, without any thing else, is sufficient proof of payment from presumption: but more than twenty years, with facts contra rebutting the presumption, will not be sufficient. (1 *Phill. Ev.* 160, 317.) Among these circumstances are relationship; poverty; insolvency, or a state approaching it; long continued and permanent absence, &c., &c. (12 *Vesey, jr.* 266; 19 *Vesey* 196.)

The only case contra, is 1 *Camp.* 217, a nisi prius case, not approved. The mention of this case in text books is no confirmation. Book makers quote every thing they find. On the contrary, the ablest judges, on full argument and advisement, Lord Eskine, Lord Eldon, and Baron Wood, all decide that insolvency is one of the circumstances to rebut the presumption. No American case is cited contra.

This is not like the act of limitation. That is a *bar*; this is a presumption of a fact, and nothing more. The bar may not be removed only under circumstances; the presumption is rebutted and *cannot exist* if any state of facts exists which destroys the presumption. If it was a bar it could be pleaded, as the act of limitation is pleaded; but as a presumption, the fact of payment is pleaded, and time or other facts proved, as a basis for the presumption.

The same difference between the bar of the statute and the presumption must be kept in view in considering what kind of acts shall form exceptions: in the one case, they must be acts of the debtor; in the other, even acts of the creditor, done under circumstances which repel the presumption, may be given in evidence to rebut such presumption. (1 *Coupl. R.* 109; 2 *Ph. Ev.* 316; 3 *M. & Ry.* 118-19, n.; 19 *Ves.* 195, n. 196; 12 *Ves., jr.* 266; 2 *Com. Law Rep.* 314.)

The Chief Justice charged.

Booth, Chief Justice.—A judgment was entered in the late Court of Common Pleas, on the 18th of December, 1818, for the plaintiffs against the defendant, for the principal sum of \$1,410 75 with interest, together with costs. The plaintiffs have issued a scire facias upon this judgment, to the May term, 1846, calling on the defendant to show cause why an execution should not be issued to obtain satisfaction of the debt and interest due under the original judgment. The defendant put in only the plea of payment. By this plea he admits the existence of the judgment set forth in the scire facias, and cannot controvert it, or make any other defence than such as arises under the plea of payment.

To sustain his plea, he relies 1st, upon the legal effect of the return

of the sheriff to the fi. fa. given in evidence; and 2d, upon the lapse of time.

1. It is contended that where a sheriff makes return to an execution "levied upon lands as per inquisition annexed subject, &c," the legal effect of this return is a satisfaction of the judgment; and that the inference is strengthened after the lapse of thirty years, with an acquiescence during that time on the part of the plaintiff. The court are of opinion, that such a return by the sheriff, has not the legal effect of satisfying the judgment. The return, although not according to law, is one that is common in practice in this county. But it is well understood as meaning that the levy is made subject to prior liens and incumbrances. Not being in accordance with the provisions of our act of assembly on this subject, it might make the sheriff liable to the plaintiff by reason of the defectiveness of the return, but cannot have the legal operation or effect of satisfying the judgment.

2. It is a well established rule of law, that where a debt due by specialty has not been demanded by the plaintiff, or acknowledged or recognized by the defendant, for twenty years, and nothing is shown to account for the delay, the debt shall be presumed to have been fully paid and satisfied.

This rule applies not only to bonds, but to mortgages, judgments, recognizances, decrees, and other debts of record. If the presumption is not repelled by sufficient legal evidence, it becomes absolute and conclusive; and the jury are bound to render a verdict for the defendant, although they may individually believe, that the debt has not been paid.

The rule is founded on the common experience of the conduct of men in relation to the transaction of business; and was intended for the security and repose of society, by discountenancing suits for stale demands, and discouraging the laches and negligence of parties in delaying to prosecute their claims, for an unreasonable length of time, when they had the means and opportunity of enforcing them.

The rule also was intended for the protection of the debtor, whose receipts or vouchers may perhaps be lost; or witnesses be dead or removed; or the true state of the transactions be otherwise obscured by lapse of time. It is better for the peace and repose of society, and the ends of justice, that the presumption arising from lapse of time should be adhered to, and not be easily rebutted; although, in many cases, it may be contrary to the actual truth of the case.

Although this rule is well established, it is equally well settled, that in all cases, the presumption of payment arising from lapse of time,

may be repelled by countervailing evidence, which satisfies the minds of a jury, that the debt is still due and unpaid. The evidence for this purpose must consist: 1st. Of an unconditional and unqualified acknowledgment or admission, either express or implied, on the part of the defendant within twenty years, of the justness of the claim and that it is still due: or 2d. A payment on account of either the principal or interest, either of which is an implied recognition of the debt: or 3d. The situation, condition, or circumstances of the parties, such as the absence of the plaintiff or the defendant in a foreign country; or the insolvency or embarrassed condition of the plaintiff or the defendant. There is no evidence either of the first or second description. But the plaintiffs contend that there is sufficient and competent evidence of the third description to rebut the presumption of payment in the present case.

The question is presented, whether the poverty or insolvency of the defendant, or a state approaching or manifestly tending to insolvency, is admissible in evidence. The court are of opinion that it is. The indigent circumstances of a creditor who holds a bond, and had the opportunity to collect it from his debtor, but makes no demand of payment either of the principal or interest, for a period of twenty years, afford strong presumptive evidence of payment or satisfaction. So, on the other hand, and for the same reason, the indigent circumstances of a debtor, his hopeless insolvency, and inability to pay his debts, are properly admissible in evidence, for the purpose of repelling presumption of payment or satisfaction arising from lapse of time.

Therefore, if the jury are satisfied that the defendant was in such a state of indigence or insolvency since the year 1820, that he was unable to pay this judgment and other debts which had priority or preference, the presumption of payment is repelled, and the verdict ought to be for the plaintiffs. But if the jury are satisfied from the evidence in this cause, that the defendant, although in indigent or embarrassed circumstances since the year 1820, had during that period, either from visible property, or from other resources from which payment might have been coerced by the use of legal process either against his property or his person, the means of paying this judgment and other judgments having a priority of lien upon any land or real property which he may have had, and, also all other debts, which by the use of legal diligence could have been made to have a priority over this claim; or, in other words, if it appears to the satisfaction of the jury, that this judgment might have been collected by the use of

legal process at any time since the year 1820, the presumptive bar from lapse of time is not removed, and in such case the verdict ought to be for the defendant.

Verdict for plaintiffs.

Bradford and Bayard, for plaintiffs.

Huffington, Rogers and Wales, for defendant.



JOHN SMITH vs. PETER JOHNSON.

A party having leave to amend his pleadings on terms, cannot proceed until the terms are complied with.

CAPIAS CASE. The defendant, at the last term, had a continuance with leave to amend on payment of costs; and *Mr. Bayard* now moved to strike out a plea since pleaded, on the ground that the defendant had no right to plead, and he was not bound to reply, until the costs were paid.

The defendant now paid the costs; and, the *Court* refused to strike out the plea; but gave the plaintiff liberty to continue the cause, at the defendant's cost for the term; saying that he might have treated the plea as a nullity and signed judgment, as the condition on which leave to plead was granted, was not complied with.

Mr. Bayard said there were other pleas, or he should have signed judgment.

Case continued, the defendant to pay costs of the term.

Bayard, for plaintiff.

Huffington, for defendant.



LILLBURN HARWOOD'S CASE.

Construction of the act of 1845, in relation to non-resident insolvent prisoners.

In the matter of the petition of Lillburne Harwood, a non-resident insolvent prisoner.

A petition was presented for discharge under the act of 1845. (10 vol. 34.) The imprisoning creditors were J. C. & J. H. Tabor of Philadelphia, who opposed the discharge.

The creditors declined examining the petitioner, and required him to proceed; insisting, that the petition unsustained by other proof, was not sufficient to call upon the creditors for any proof.

By the Court.—This act has not been the subject of much practice or construction : there have been but two or three cases occurring under it. But it must be taken in reference to the general system of insolvent laws; under which the insolvent files a petition, verified by his own affidavit, and this is sufficient to call for proof from the opposing creditors. In the present proceeding the petition, thus supported, is sufficient to require the creditors to show cause against the discharge.

They then called witnesses to prove that the petitioner was lessee of the Columbia House, at Cape May, doing a large and profitable business; that he had rented stores, and was about to commence the shoe business in Philadelphia largely, as he said, on a cash capital; and that he was living handsomely and expensively in Chestnut street, Philadelphia.

Whitley and Rogers contended, that the act of 1845 went no further than to extend to non-residents the relief given by section six of the State insolvent law. Upon any other construction they said the legislature had given to non-residents a relief not extended to citizens of this State. They insisted also, that they had proved that the petitioner had property which he was concealing.

Guthrie and Wolfe, contra.

By the Court.—The act of 1845 provides two modes of relief: by petition here, or by proceeding under the sixth section of the general insolvent law which was revived and re-enacted for this purpose, though it was then in full force, having been twice revived before, viz: by the act of 1833 expressly, and again in 1841 by implication; the repealing act being then repealed.

The first section of the act of 1845 gives to non-residents the benefit of the sixth section of the original law, which requires the imprisoning creditor, under a judge's order, to enter into recognizance to indemnify the county against any charges on account of the prisoner or his family: the second section gives a distinct remedy, by petition to this court for discharge from imprisonment as against the imprisoning creditors; and the third section provides, that if it shall not be made appear to the court that the petitioner has been guilty of fraud in relation to the imprisoning creditors, or any of them, the court shall discharge the petitioner from imprisonment; and he shall

not be again imprisoned for the same debt; but the discharge shall have no other effect. The case is, therefore, properly before this court on the application for a discharge.

But, on the facts, we are all of opinion that a case has been made out which excludes the petitioner from the benefits of this law. We therefore remand him to prison, and dismiss the petition.

Wolfe and Guthrie, for petitioner.

Rogers and Whately, for the creditors.



RODERICK McDERMOTT vs. JOHN McCORMICK.

The signature of a witness attests the execution of a note, though signed by the defendant's mark.

If the declaration be in assumpsit on common counts, an acknowledgment under hand should be replied to a plea of non-assumpsit infra tres annos to get the benefit of the six year limitation.

THIS was an action of assumpsit, with the usual counts for money lent, &c. Pleas, non-assumpsit; the act of limitation, &c.

Plaintiff offered in evidence a due-bill for \$600, dated February 28, 1840, signed by defendant's mark, and attested by James McDermott, who was proved to be dead, and proof was made of his handwriting. He also, gave some evidence of an acknowledgment in 1841, or 1842.

Bayard objected to reading the due-bill in evidence, on the ground that its execution was not sufficiently proved. The note was signed by a mark, and attested thus: "Witness, James McDermott." He said this attestation proves nothing. If the paper was signed by a name, the attestation of a witness' name, proves the signature; but where it is merely signed by a mark, the name of a witness proves nothing, unless it states what it is signed to prove; as witness to the mark; or to the signing by mark; or to the execution.

This paper is drawn by the plaintiff; the name of the defendant is written by the plaintiff; and the word "witness" is in the same hand. Everything but the name of the witness, and perhaps, the mark, is in the plaintiff's handwriting. The proof then of the signature of the witness, does not prove the note.

2. The case is barred by limitation. The action is in assumpsit on the common counts, and was brought Nov. 16, 1846, for a claim

which, if proved, is proved to have been due February 28, 1840. The three year bar applies, because, though this paper be relied on as an acknowledgment under hand, it cannot be of avail to remove the bar of the statute for more than three years, unless it had been declared on, or replied to the plea of the act.

3. If it had been declared on, it is barred by the six year limitation. The acknowledgment attempted to be proved of some admission in 1842, is too vague to be applied to this instrument.

4. The note is so scratched and erased in the indorsements, which become a part of the instrument, as to invalidate it.

Mr. Wales.—1. No form of attestation is necessary. The jury will say whether the word "witness" was not put there to attest that the witness saw the note executed.

2. There is no alteration on the face of the acknowledgment. The erasure is merely of indorsements, which being summed up in another place, are erased in detail.

3. As to the limitation, there is evidence of an acknowledgment in 1842. But the paper itself is an acknowledgment under hand, and the act does not run for six years. This is the cause of action. It need not be specially declared on. A promissory note may be given in evidence to prove the assumpsit on common counts.

The acknowledgment relied on is not an acknowledgment to take the case out of the act. It was never barred. Dated in 1840, it was acknowledged in 1842. (*1 B. & Ald. 19.*)

Mr. Bayard replied.

By the Court.—1st. As to the attestation by the word "witness," and the signature of the witness; it is very different from the formal attestation of a will when all the requisitions of the statute of wills must be contained in the certificate of attestation, or proved otherwise. But the signature of the witness to this paper, can mean nothing else than an attestation of the signing. The word "witness" can have no other application.

2. As to the alterations or erasures on the back of the note; they are not of such a character as to exclude the paper, but will be left to the jury as a circumstance of suspicion, and with direction that, unless explained, the presumptions would be against the party holding the paper.

3. As to the replication of the writ issued, to the plea of limitation, though usual in the English practice, it is never done here. The production and date of the writ are always a sufficient answer to the plea.

4. As to the acknowledgment to take the case out of the act of limitation, it must be a distinct recognition of the claim, or acknowledgment of a subsisting demand.

5. On the last ground, whether the plaintiff is at liberty to give in evidence this due-bill on the pleadings in this case, we think there is no doubt on principle, but are somewhat embarrassed by the former practice. The action is assumpsit on the common money counts, with a count on an account stated. The plea is non-assumpsit, and the act of limitation; that is, that the plaintiff did not promise within three years next before the commencement of this action; to which there is a general replication, which is, that the defendant did promise within three years. Under this issue, the due-bill is offered in evidence and objected to; its date being more than five years before this action was brought.

Had the evidence been admitted without objection, as has frequently been done, the question which has been argued would have arisen, viz: whether the form of the acknowledgment, being under hand, would not prevent the bar by showing that the six year limitation, and not the three year, is applicable to the case. But the evidence is itself inadmissible under the present issue. Had the plaintiff, instead of a general replication to the plea of the statute, replied that the party, by an acknowledgment under his hand, had promised within six years before action brought, this evidence might have been admitted.

At present we cannot rule it in under the issues now trying, and must nonsuit the plaintiff. We shall give him leave, however, if he chooses, to take this nonsuit off, with a view of leaving the further consideration of this question open.

A rule was laid to show cause why the nonsuit should not be taken off; which was afterwards discharged, but without argument.

Rule discharged.

Wales, for plaintiff.

Bayard, for defendant.

JOHN LOGAN vs. JOHN H. BARR.

An agreement to accept a surrender of even a parol lease, is required by the statute of frauds to be in writing.

ATTACHMENT for rent: goods attached: issue directed to try whether there was a just demand of rent; and, if any, the amount thereof.

Barr rented a storehouse of Logan, from the 25th of March, 1846, to the 25th of March, 1847, at \$375. The first two-quarters were paid. In October, 1846, Barr sold out his goods at public sale, and Logan agreed verbally to take the house off his hands. Logan did not, in fact, take possession until the 25th of March, 1847. The question was, whether this agreement was required by the statute of frauds to be in writing.

Bayard.—Unless the law requires a surrender of a lease to be in writing, the defendant is entitled to the verdict. The question I submit is, whether under our law a parol lease for a year may not be surrendered by parol. It is certain that an acceptance of the premises determines the lease.

I admit that the English statute of frauds requires such a surrender to be in writing, as an agreement concerning an interest in lands. If the case stood upon the English statute, or upon our act about contracts and assumptions (*Dig. 88.*) alone, I should incline that the surrender of even a parol lease should be in writing. But the act concerning landlords and tenants, (*Dig. 368.*) authorizes expressly a contract by parol for the occupation of lands for the term of one year, and I think it follows, that such an agreement may be determined by parol.

Rogers, for plaintiff, denied that there was sufficient proof of an agreement to accept a surrender during the year; but said that the court would require the proof of such an agreement as this to be by writing.

The act of 25 Gen. 2, "about contracts and assumptions," whether construed alone or in connection with the landlord and tenant law, requires such a contract as this for the surrender of an interest in land to be in writing. The terms of the first act are sufficiently comprehensive to include a surrender of a lease; "any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them." These terms are similar to the English statute of frauds, under which such a surrender has been held to be included. (*2 Selw. N. P. 843.*)

The landlord and tenant act need not be construed in connection, it is not in pari materia; but, if taken together, that act makes but a single exception; and that is to allow a *parol demise* of land for one year. The expression is, "no demise, except it be by deed, shall be effectual for a longer term than one year;" this then, being an exception, stands by itself, and draws nothing after it from out of the act about contracts and assumptions, usually called the statute of frauds of this State. And it is plain that the exception must be confined to the demise, and not extend to a surrender, because the landlord and tenant act itself requires a notice in writing to dissolve the demise, though it be by parol. (3 Harr. Rep. 364.)

Mr. Bayard replied that this was where either the landlord or tenant undertook to determine the tenancy by *notice*; but he insisted that where both landlord and tenant *agreed* to determine the tenancy at the end of the year, it might be done without writing, and such agreement proved; and he argued that if such an agreement would terminate a tenancy at the end of the year, it might during the year.

The Court charged the jury, that the agreement relied on in this case, to accept a surrender of the premises during the year for which they were demised, was an agreement within the act about contracts and assumptions, and must be in writing.

Verdict for plaintiff.

Rogers, for plaintiff.

Bayard, for defendant.



JAMES LINDSAY vs. PETER SPRINGER.

A *parol* agreement fixing a dividing line of lands, and ascertaining its position on the ground; with possession immediately following, is conclusive on the parties, and cannot be controverted.

Such an agreement is not within the statute of frauds.

THIS was an action of trespass quare clausum fregit. On a dispute between the parties concerning a dividing line of their lands, they employed a surveyor, who surveyed both their farms, and found a vacant strip about sixteen feet wide lying between them, not covered by the lines of either. They agreed to divide this strip; found the centre; together planted a stone, and moved their fences on the line so fixed. They held thus for eleven years; though it was proved

that the defendant soon after this adjustment of the line said the surveyor had made a mistake, and that he would not abide by it, but would move the fence back again when it became necessary to reset it.

Whitely, for plaintiff.—Where the owner of a tract of land by agreement recognizes a boundary or line, it is conclusive against him; even though the lines of his property go beyond it. The acts and declarations of parties as to lines or boundaries may control the lines of the deeds. (*7 Cor. Rep. 761; 6 Wend. Rep. 467; 12 Ibid 127; 4 Wheat Rep. 517; 7 Johns. Rep. 245.*)

Gray and Bayard.—The cases cited are all cases of long acquiescence which presumes a prior settlement of the line. But to say that a mere declaration fixing a boundary shall transfer and convey title, is in conflict with the statute of frauds. A party can no more convey a part of his land thus by parol than he can convey the whole. (*8 Wend. Rep. 409.*)

Mr. Whitely replied: and the Court charged the jury: That an express parol agreement fixing the dividing line, followed by immediate possession, would bind the parties; that acquiescence was merely evidence of an agreement, and must therefore be of some considerable continuance; but, if an agreement be proved, it binds at once.

Verdict for plaintiff; and, on motion, rule to show cause why the verdict should not be set aside and a new trial had, for misdirection on this point.

By the Court:

Booth, Chief Justice.—This was an action of trespass quare clausum frigiti. The plaintiff and defendant were the owners of adjoining tracts of land; and it appeared that differences had existed respecting the true location of the division line. Early in the year 1834, the defendant became the owner of the tract now held by him; and immediately went into the possession of it. In the summer of that year, the plaintiff and defendant agreed by parol, to establish their division line. For that purpose, they called a surveyor to assist them; who, after surveying, in the presence of the parties and others, according to the respective title deeds, was unable to make the lines of the two tracts meet. The parties then agreed to make an equal partition of the space not embraced within the limits of their respective deeds; and accordingly run a line, on which they set stakes, and placed a large stone, which was dug up a few feet distant on the plaintiff's side of the line, and was said to have been a

boundary for the two tracts. Both parties then called all persons to witness, that the line so indicated by the stakes and stone, they mutually established as their division line. One witness testified, that about a month after the division line was established, the defendant said he regretted he had made the agreement, and intended to compel Lindsay to move the fence back on his own land. Both parties however acquiesced in the establishment of the division line, and held possession up to it, for upwards of eleven years; the plaintiff having planted a thorn hedge upon it and kept up his fence. In the autumn of 1845, the defendant without notice to the plaintiff, cut down his hedge and fence; for which trespass, the present action was brought.

Upon these facts, and under the charge of the court, the jury found a verdict for the plaintiff. The present rule was obtained on behalf of the defendant, on the ground of a supposed misdirection of the court in that part of the charge, in which it is stated as a principle of law; that if the owners of two adjoining tracts of land, having differences respecting the location of their division line, make an express agreement, although by parol, to settle the line; and for that purpose take with them a surveyor, with whose assistance they locate and establish a line as the dividing line of their respective tracts of land, and each immediately takes and holds possession up to it; both are concluded from afterwards controverting it.

At the hearing of the rule, the counsel for the defendant contended that the principle was laid down too broadly, and the law mis-stated: 1st. Because it excluded from the consideration of the jury, all evidence which tended to show a mistake in fixing the division line; particularly the fact, that the large stone which was dug up, was reputed to have been a boundary for the two tracts. And although it is well settled, that a contract or agreement founded in mistake or ignorance of material facts, will not be enforced either at law or in equity; yet the principle announced by the court precludes a party from showing a mistake of fact, and the jury from considering the evidence of it, if offered. 2d. Because the establishment of a boundary line under a mere parol agreement, is not conclusive, unless the parties have acquiesced in it, for a period of twenty years. 3d. Because the court gave to the parol agreement and to the line which was fixed by virtue of it, greater force and effect, than our act of assembly for marking and bounding lands, (*Dig. 82, sec. 5,*) gives to the written agreement of parties for settling the location of their lands, and to the plot of the land, whose location is settled by

the parties, pursuant to such agreement. For although the agreement and plot by the consent of parties, be recorded under the direction of the court, the record is not conclusive, except in case no action is brought within seven years next after recording the proceedings, to call in question the location of the lands.

1st. The first objection is in itself a fallacy. It is true, that where a contract is made, or an act done, under a mistake or ignorance of material facts, the party may have relief at law or in equity. The reason is, that it was not his intention to make such contract, or do such act; and as his assent never was given; the contract, therefore, is not valid, nor does the act bind him. Upon this principle, a court of equity gives relief in cases of written contracts, where a mistake is clearly made out by parol evidence; also in the case of a settled account, where specific errors are plainly shown. So too, an action for money had and received, lies to recover money paid under a mistake of facts: and where money has been erroneously overpaid, arising from a clear mistake in the settlement of an account, it may be recovered back in assumpsit. But if in consideration of the uncertainty of the facts of the case, the difficulty in ascertaining them, and for the purpose of avoiding a suit, the parties agree to settle the matter in controversy, and afterwards carry their agreement into execution, both shall be bound by it; because such is their contract, to which they have mutually assented. And although facts may afterwards appear to one of the parties, which had he known at the time of the agreement, he would not have entered into it; yet he shall not be permitted on that account to open the controversy; because his uncertainty about the true state of the facts, was the very reason why he made the compromise.

2d. It is said on behalf of the defendant, that the establishment of a boundary line under a parol agreement, is not conclusive, unless it has been acquiesced in by the parties, for a period of at least twenty years. If a written agreement were made, under circumstances similar to those which existed in the present case, to establish and abide by a boundary line, which is immediately located by the parties, pursuant to such agreement; no doubt the parties would be bound by it, as well after the lapse of one year, as of twenty years. But as the contract in such case is not required to be in writing, (*Boyd's Lssee vs. Graves*, 4 Wheat. 517; *Kip vs. Norton*, 12 Wend. 130,) an express parol agreement fairly made in a like case, by virtue of which the boundary is established and immediately followed up by possession, would have the same effect, of precluding the

parties from afterwards controverting it. The lapse of twenty years is merely matter of evidence to establish a particular fact. Thus the adverse and uninterrupted possession of land for that period, is conclusive evidence at common law, of a grant; and so too, the acquiescence in a boundary line for the same length of time, by the parties interested, is conclusive evidence of an express agreement to establish such line and to adhere to it; although in point of fact, there was neither a grant in the one case, nor an express agreement in the other. (*Rockwell vs. Adams*, 7 Cowen 762; *Same*, 6 Wendell 460; *Kip vs. Norton*, 12 Wendell 130.) But if a grant under seal could be shown; or an express agreement although by parol, and the location of the line pursuant to it, could be clearly proved by positive evidence, no resort would be had to presumptive evidence. When proved by either, the parties are conclusively bound by it. But the argument for the defendant makes the effect of an agreement to depend on the nature of the evidence offered to prove it; and thus gives to it a conclusive force, when shown by presumptive or circumstantial evidence; and denies to it the efficacy, when established by direct and positive proof.

3d. The principle decided by the court, does not conflict with the fifth section (*Dig. 82.*) of the act for marking and bounding lands. The first part of the section has reference precisely to such a case as the present. It declares, that where the parties interested, fairly agree to settle the bounds, line or lines of any tract of land, and do actually fix and settle them; the commissioners, under any commission to mark and bound the land, shall have no power or authority between the same parties, or those claiming under them, to vary from the lines so settled or agreed upon. Whether settled under a written or parol agreement, the lines conclude the parties and commissioners. They must be conformed to, and are thus made by the law, to control both the courses and distances in the title deeds; although the form of the oath or affirmation taken by each commissioner, before proceeding to execute the commission, is, "that he will settle and adjust the location of the land mentioned in such commission, most agreeably to the true original location thereof."

The latter part of the fifth section does not relate to the case of parties by their own direct and immediate act, settling and establishing the lines of their lands, as is assumed in the argument for the defendant. That case was already provided for, in the former part of the section. The latter part referred to in the argument, manifestly relates to cases where the parties cannot agree upon the true

location of their lands; and, therefore, authorizes them to enter into an amicable agreement, which must be in writing, to have the location ascertained and settled by third persons; and thus to avoid the expense of adversary proceedings by commission to mark and bound the lands. The written agreement is in the place of a commission; and the arbitrators are substituted in the place of commissioners. The agreement, the settlement by the arbitrators, and a plot of the land so settled, may, by the consent of the parties interested, be recorded, under the direction of the court, as is mentioned in the third section of the act, respecting the return of the commissioners. By a reasonable construction of the act, the consent of the parties ought to appear in their written agreement; and not depend, after the settlement of the lines by the arbitrators, upon the humor or caprice of either party. If it were otherwisc, the object and intention of the latter part of the section would be defeated; for in every case where the location of the land was not according to the notion or whim of a party, he might withhold his consent, and thus render all the proceedings a nullity. The consent of the parties expressed in their written agreement, would not preclude either of them from making any such legal objections before the court, founded upon any misconduct of the arbitrators, against the recording of the agreement, the award and plot, as may be made under the third section of the act, in the case of a return by commissioners. If the objections should be overruled, the court would order the agreement, award, and plot, to be recorded. When recorded, the section declares, they shull have the same effect and consequences, as if the location of the land had been settled by commissioners. An action, therefore, as is provided in the fourth section, may be brought at any time within seven years next after the recording of the proceedings, to call in question the marking and bounding of the land by the arbitrators; but if no action be brought within that period, the record becomes conclusive evidence of the original location.

The court perceive no ground to disturb the verdict, and therefore, the rule for a new trial is discharged.

Whitely, for plaintiff.

Gray and Bayard, for defendant.

POINTS RULED AND CASES ADJUDGED
BY THE
COURTS OF GENERAL SESSIONS
AND
OYER AND TERMINER.

STATE *vs.* JOHN MOUSELY.

Power of magistrates to settle cases of assault and battery.

Indicted for assault and battery. Plea, autrefois convict.

The defendant was arrested and taken before Justice M'Caulley, who bound him over to appear at court. The prosecutor afterwards agreed to settle the matter, and went with defendant before Justice Veach, who allowed them to compromise, on payment of costs.

It was contended on the part of the defendant, that the act of assembly gives authority to *any* justice of the peace, whether the committing magistrate or another, to permit the parties to settle cases of assault and battery. (*Dig. 360.*)

Court.—The act must be construed as a whole, and neither of the clauses referred to is to be taken separately. This is an act giving jurisdiction. Before it, the justice had no power to try cases of assault and battery; and, to preserve the constitutional right of trial by jury, the defendant's consent is required in all cases, before the justice can proceed. Either on his refusal to be tried by the justice; or on the refusal of the justice, under the discretion given him by the law, to try the case; he must hold the defendant to bail for his appearance at court, and commit him for refusal to give bail. There is no appeal from this decision of the justice, and no authority anywhere, much less in each of the other justices of the county, to review the decision of the committing magistrate on this question, nor to prevent the case from coming before this court after a decision

that it is a case which ought to be tried here. No other magistrate has any thing further to do with the complaint than to take the bail required, or such other bail as may be deemed sufficient, on an application to a judge to reduce the bail.

Judge Layton dissented.

The defendant was convicted.



STATE *vs.* RECORDS.

Bowling alleys connected with taverns are unlawful, though the players only risk the price of the game.

The defendant, a tavern keeper, was indicted for a misdemeanor in suffering a game of chance to be played about his house on which money was betted.

Court.—By the common law, games of hazard were not prohibited, though gambling was; and gambling consisted in playing for such stakes, as, added to the amusement, made the consequences dangerous to society. (*Hawk. P. C. b. 1, ch. 92, § 1; 1 Russ. 506.*) Our legislature have chosen to prohibit tavern keepers from allowing not merely gambling, but any kind of game, if money, liquor, or other thing is betted, from being played in or about their houses. The amount of the bet has nothing to do with the legal offence; if any thing of value be betted with the permission of the inn-keeper, it is a violation of the law. If the compensation for the use of the bowling alley be made to depend on the result of the game, and the inn-keeper permit the game to be played with a knowledge of this risk, it is a violation of the law.

Verdict, guilty.



SAMUEL G. SMITH'S CASE.

An insolvent discharged on a judge's order for want of indemnity to the county, cannot be again imprisoned in the same case.

Kent, April term, 1844. *Habeas corpus.* The sheriff returned that the defendant was in custody on a writ of *ca. sa.* at the suit of Thatcher & Coleman.

The defendant was rendered by his special bail in this suit after judgment and fi. fa. returned nulla bona ; ca. sa. returned non est, and sci. fa. issued. He was afterwards discharged under a judge's order for indemnity to the county, under section six of the act concerning insolvent prisoners, (*Dig.* 312,) and forthwith arrested again under an alias ca. sa. in the same case. The application was now for his discharge under said section, which provides that a person discharged from imprisonment pursuant thereto, shall not be again arrested "upon the same process."

The argument of *Bates, jr.*, for the petitioner was, that this imprisonment, being in the same suit, was a second imprisonment on the same process, taking the term in a general sense.

Mr. Frame, replied that the imprisonment on the ca. sa. was not on the same process from which the defendant was discharged; that he was not before imprisoned on any process, but on the surrender of his bail and commitment of the judge.

The Court said that the narrow construction which regards the meaning of the term "process," as applicable merely to the writ, would defeat the object of the law. Neither can it mean similar process; for it would be idle to suppose the legislature meant to discharge a debtor from one writ, and allow the creditor to imprison him on an alias, in the same case. It is said the defendant was not imprisoned on the first occasion by virtue of any process, being surrendered by his special bail. But he cannot be said to be committed by the bail. He is in on the commitment by the judge on the surrender; and is in custody by virtue of process in this suit. Even the bail piece may be properly regarded as process for this purpose. The meaning of the law is, that after the rule is made on a creditor to give security to indemnify the county against the support of his debtor, and he refuses to do so, he shall not be permitted to imprison him again in the same suit.

Petitioner discharged.



STATE vs. ROBERT B. M'DONALD.

Liability of election officers for taking illegal votes.

New Castle, May term, 1845. The indictment was against defendant as presiding officer of an election, for knowingly and wilfully taking the illegal vote of one John Pontseller.

The Court.—The ground on which the vote was objected to was want of residence. P. had resided in Wilmington, and left his home for Pennsylvania. For what purpose? was it a change of residence? This is to be collected from his acts and declarations. If he went with the intention to reside in Pennsylvania, or to give up his abode in Delaware; it was a loss of the residence, and he had no right to vote. Even if he went with a floating intention to return, it would be a loss of residence. (9th vol. 379.)

Did defendant take the vote knowing it to be an illegal vote? Defendant acted in a judicial capacity, and is not to be held liable criminally for a mere error in judgment; any more than a justice of the peace, juror, or judge. If, therefore, a presiding officer or judge of election, acting honestly from the best judgment he can form on the evidence before him, take a vote which turns out to be an illegal vote, he is not liable legally or morally. But if such officer, knowing a vote to be illegal, takes it corruptly, his position cannot protect him from the just punishment of his offence. The law requires the presiding officer at this election to call to his aid two freeholders whom it makes the judges of the election, equally with himself. Where, therefore, a vote is challenged, and two of the judges concur in rejecting it as an illegal vote, the presiding officer has no right to receive it; and, if he does receive it, and it turns out to be an illegal vote, it would be evidence of corruption. (Dig. 177.)

The defendant was convicted, and fined \$200.



THE STATE vs. ALEXANDER PORTER.

Proof of guilty knowledge in an election officer.

The defendant was indicted for refusing a legal vote, the vote of Charles Fawcett, at the general election in 1844, in Wilmington; he being the inspector of the election.

The court charged as in M'Donald's case, ante 555.

The jury, after being out all night, came into court and proposed the following questions, in writing:—

Is it incumbent on the prosecution to adduce *positive evidence* that the defendant acted from a corrupt motive? or what precisely is the nature of the evidence that the prosecution must bring to prove the corrupt motive?

It also appears that some of the jurors argue, and cannot come to a verdict, from the fact that they see proper to connect with the defendant, the judges' concurrence, or a majority of them, with the defendant, in his rejection of the vote; what influence on the minds of the jury ought such concurrence to have?

Also, has it been proved before the court and jury, that J. W. Duncan concurred in the rejection of said vote.

By the Court.—The matters referred to, in the note from the jury, are rather within their own province to decide upon, than that of the court; but we may, perhaps, properly make some suggestions in reply to your communication.

What we understand the jury to mean by positive proof of corruption, is not possible in a direct sense, for the motives of a man's conduct, and the impulses of his heart, cannot be the subject of direct positive proof; but there must be proof so clear, or positive, as to produce conviction, of acts, or declarations, or circumstances, from which the jury can, and indeed, have to, draw the inference of corruption. It is difficult to define corruption; but we may say, that it is the wilfully and corruptly doing an act, or omitting a duty, which a person acting in a public capacity, *knows* it to be his duty to do, or omit; in disregard of his official duty, and the obligations of his oath.

As to the connection of other persons in such violations of duty, where the corruption is proved, their participation can be no shelter or excuse for the defendant; but their consent to the act may be regarded in considering the probability of the defendant's corruption.

As to the fact whether all the judges concurred in rejecting this vote; it is for the jury, not for us, to say, whether it was proved. Our note of Mr. Cleland's testimony, is, that he said *we*, meaning himself and Mr. Duncan, the judges of the election, were satisfied to reject the vote.

The jury came in again at about 8 o'clock, P. M., and stated that they had not agreed, and probably never would agree, they having been out about twenty-seven hours, and no nearer together than when they first retired. Whereupon, a juror was withdrawn, and they were discharged.

Bradford, dep. att'y. gen'l. for the State.

Rogers, jr., for defendant.

STATE vs. JACOB FREST.

Residence: evidence of intention to change domicil.

Indictment for illegal voting at the inspector's election in Wilmington, in October, 1844; he not having resided in the State one year next before said election.

Court.—Domicil, or residence in a legal sense, is determined by the intention of the party. He cannot have two homes at the same time. When he acquires another he loses that home which he has exchanged for the new one. To effect this change there must be both act and intention. “Mere intention to acquire a new domicil without the fact of removal avails nothing; neither does the fact of removal without the intention.” (*Story* 47.) The defendant's *intention* to leave Wilmington did not change his domicil, unless he went to Philadelphia in pursuance of that intention; but if he did go in execution of any intention to leave this State, as his place of residence, and find a home elsewhere, that moment he lost his residence here. What his intention was in this behalf must be collected from his acts and declarations. “If a man is unmarried, that is generally deemed the place of his domicil where he transacts his business, exercises his profession, or assumes municipal duties or privileges. But this rule is of course subject to some qualifications in its application. (*Story* 46.) If, for instance, a mechanic in Wilmington, without any intention of changing his residence, should go to Philadelphia to do a job of work, or to work generally until a job which he had engaged in Wilmington was ready for him, in that case the exercise of his trade in Philadelphia would not be sufficient evidence of his domicil there. But if a person, intending to break up his business in Wilmington and remove to Philadelphia or elsewhere as a home, should go there and exercise his trade, this would be sufficient evidence of a change of domicil, even though he should, before leaving, secure a job of work at Wilmington, and intend to come back for the purpose of doing it. For it is not necessary that a man should determine never to come back, either temporarily or permanently, in order to lose his residence here. “If a person has actually removed to another place, with an intention of remaining there for an indefinite time, as a place of present domicil, it becomes his place of domicil, notwithstanding he may entertain a floating intention to return at some future period.” (*Story* 45; 9 *Del. Laws* 379.)

“The place where a person lives is taken to be his domicil, until

other facts establish the contrary. (*Story 45.*) It is for the State, therefore, to satisfy the jury that the defendant in this case, went out of the State with the intention to change his residence and to take up his abode and make his home elsewhere. If they are satisfied that such was the purpose with which the defendant left Wilmington and went to Philadelphia in April, 1844, they ought to convict him; if otherwise he should be acquitted.

As to the act of 1841, and its effect in giving a construction to the constitutional requirement of residence, it would doubtless be inoperative as to any enlargement or restriction of the constitution; but we apprehend that the fourth section of that act announces no more than a general principle of construction applicable to the question of domicil, and almost in the very words of a distinguished writer on constitutional law. (*Story Conf. Laws p. 45.*)

Verdict, not guilty.



STATE *vs.* JOHN N. HARKER.

Section 24 of the act of 1825, regulating the general election, is not repealed by the act of February, 1845.

Distinction between "offering" and "promising" a reward.

Indictment bribery: motion in arrest of judgment.

By the Court:

Booth, Chief Justice.—The defendant was indicted under the twenty-fourth section of the act of 1825, entitled "An act regulating the general election."

The charge contained in the indictment is, that the defendant unlawfully promised a reward of five dollars to James Roach, to influence him in giving his vote at the general election, held on the second Tuesday of November last. Of this charge the defendant was convicted. A motion has been made to arrest the judgment for two reasons which are filed in these words, namely: "*First.* For that the act of assembly upon which the said indictment is founded, and the provisions thereof, so far as the same relate to the offence of bribery, have been, and the same are repealed. *Second.* For that the said indictment is insufficient and defective in not setting forth the general election and truly stating the offence mentioned in the act of assembly." The second reason was abandoned in the argu-

ment. Our attention, therefore, is called only to the first. The defendant's counsel has contended, that by the third section of an act of assembly, passed February 11th, 1845, the twenty-fourth section of the act of 1825, is virtually repealed.

It is a settled rule, that a later statute is never construed to repeal a prior statute, unless there be a contrariety or repugnancy in them; or unless some notice be taken of the former statute, indicating an intention in the legislature to repeal it. In the act of 1845, no notice is taken of the twenty-fourth section of the act of 1825, nor any allusion made to it. Is there, then, such an inconsistency or repugnancy in them, that the two cannot stand together? If there is not, and as the law does not favor a repeal by implication, the latter cannot be construed to repeal the former. Each section seems to have been intended to effect a different object. The twenty-fourth section of the act of 1825 imposes a forfeiture upon the person who shall give, offer, or promise, any reward, gift, favor, or benefit, to any voter, to hire, bribe or influence him in giving his vote. The third section of the act of 1845 imposes a forfeiture on any person who shall give, offer, or procure money or other thing of value, for the purpose of influencing the vote of any voter, or to induce him to absent himself from the polls; and also imposes a forfeiture on any person who shall release, or offer to release, any debt or obligation, by way of bribe, gift, benefit, or reward, for the same purpose. A person, therefore, who gave, or offered money to third persons, or procured money and placed it in the hands of third persons, not for the purpose of bribing such third persons, but to be used by them for the purpose of bribing voters, and corrupting the purity of our elections, could not have been indicted under the twenty-fourth section of the act of 1825, because by its terms, it includes only the case of giving, offering, or promising a bribe directly to the voter himself; and does not embrace the case of a gift, offer, or procurement of money to be placed in the hands of others, to be used by them for the purpose of bribing voters. In this view of the two sections, there is no conflict between them. But, admitting that a construction may be given to the third section of the act of 1845, so extensive as to include not only the cases of giving, offering, and of procuring money to be used by others for purposes of bribery; but also the cases of giving and of offering a bribe directly to the voter himself, it cannot be considered, upon any principle of construction, as embracing the case of a *promise by one person to another*, of a reward to influence the latter in giving his vote. The sections of the two acts are *in pari materia*,

and are to be taken and compared together, as if they were one law. Where different words are used, it is to be presumed that they were used to express different ideas; and so where there is a material change, alteration, or omission, in the words used in different statutes upon the same subject matter, or in different clauses of the same statute, it is to be inferred that the attention of the legislature has been directed to the point, and that the change, alteration, or omission was designed. The twenty-fourth section of the act of 1825 imposes a penalty on the person who shall give, offer, or *promise* any reward to a voter to bribe or influence him. The third section of the act of 1845 imposes a penalty on the person who shall give, offer, or *procure* any money or other thing of value, for the purpose of influencing the vote of any elector; but omits the case of the person who shall *promise* to another any money, or other thing of value, for such purpose. Supposing then, as regards the giving and the offering a reward to a man by way of bribe to influence his own vote, such an inconsistency or repugnance exists between the twenty-fourth section of the act of 1825, and the third section of the act of 1845, so that the latter by implication repeals the former in those two respects, no such repugnance exists as regards the offence of a person *promising* a reward to a man to influence his vote. The fair inference is, that the legislature intended by the omission, to leave such offence to be prosecuted and punished under the twenty-fourth section of the act of 1825. To avoid this conclusion, the argument for the defendant assumes, that to offer a reward, or to promise a reward, means the same thing. But there is a clear and distinct meaning to be attached to each of the words "*give*," "*offer*," "*promise*," and "*procure*," as used in the two acts. To *give* a reward by way of bribe, is to pass or deliver the reward or bribe immediately to another. To *offer* it, is to present it for acceptance or rejection; to *promise* it, is to make a declaration or engagement that it shall be given; and to *procure* it, is to obtain it from others.

Therefore, as the provision in the twenty-fourth section of the act of 1825, relating to the case of a person who promises any reward to any man to bribe or influence him in giving his vote, remains unrepealed, the court refuse to arrest the judgment.

Defendant sentenced.

STATE vs. SAMUEL THAWLEY.

Dying declarations; when admissible.

The state of the deceased's health at the time of the injury, is evidence.
His character as a violent man, is not evidence.

Kent, April term, 1845. Indictment, murder of Waitman Vickery.

The deceased lived about nine days after receiving a blow on the head from the defendant. On the day he was struck, and every day afterwards, until he became insensible, he said he should die. His declarations as to the cause and extent of the injury were offered and objected to, as not being made under the perfect conviction of a dying state; and as not being competent to prove that the blow was the cause of death.

The Court, (Milligan dissenting) admitted these declarations as dying declarations; though they said that as to the wound being the cause of the death; and also as to the condition of the deceased at the time of the declarations, they would be open to remark before the jury, in connection with general evidence of his intemperate habits, and low state of health. (*Ros. Ev. 32; Mosely's Case, 1 Moo. Cr. Ca. 97, a.*)

The defence set up was, that the blow was struck in self-defence; and a witness was asked whether the deceased was not a violent man, and in the habit of attacking others with dangerous weapons?

It was objected that the character of the deceased was not in issue, and, after argument—

The Court, (Harrington dubitante) rejected the evidence.

Booth, Chief Justice.—The testimony offered is the general character of the deceased as a violent man. From the fact, that we cannot find any case in the books, where this evidence has been admitted, nor any principle which would admit it, we feel constrained to reject the evidence. We do not see how the character of the deceased as a quarrelsome or fighting man is in issue. The question is, guilty, or not guilty of murder. The homicide being made out, it lies on the defendant to reduce the offence below the grade of murder, and he must do this by evidence of facts, and not by the mere general bad character of the deceased. If such evidence is admissible it would follow that the character of the prisoner as a peaceable or violent man must be admissible, for it is certainly as important to know his character as that of the deceased. Yet, it is

perfectly well settled that the defendant's character cannot be inquired into, unless he puts it in issue.

Judge Harrington's doubt arose from the fact, that in four cases within his knowledge, this evidence had been admitted without objection, viz., State vs. Cochlan, Elason, Saul Thompson, and Prince Tilghman. He thought it might possibly come within the reason of the principle, that "in particular cases where the character of the prosecutor is mingled with the transaction in question, it forms a point material to the issue, and may consequently be inquired into." (*Ros. Ev. 88.*)

The defendant was acquitted.



STATE vs. MARY E. BOSTICK.

Age of criminal liability. Mischievous capacity.

Evidence of confessions—what influence will exclude them.

Kent, May term, 1845. The defendant, a white girl twelve years old, was indicted for arson.

The dwelling of George P. Fisher, Esq., of Dover, was fired on the 10th of March, 1845, and his two children burnt to death.

Mrs. Ann Eliza Fisher.—The prisoner was in my service up to, and after the 10th of March last. She was twelve years old last August. She is a very shrewd, artful girl; not intelligent, or very capable of learning; but smart to work, and shrewd in mischief. On the 10th of March, about 8 o'clock, the children were playing in the kitchen; and defendant, without any direction from me, ordered them to bed. She went up with them; and, when she came down, she passed through the room where I sat with others, sewing and reading. After a short time we were alarmed by a noise; I started up with the rest; and, finding the house on fire, we rushed out, and fell down stairs. I remember but little after this.

After the children were buried and I was about to leave the house, and Elizabeth had got her clothes to go home, I tried to get her to confess but failed. I thought she was on the eve of confessing to me and Mrs. Houston in the parlor chamber; but others came in, and she stopped. I went with her into another room; and, after denying it when first directly charged, she made to me a full and particular confession of the whole matter.

I said to her, Elizabeth, the suspicion is general against you and you had as well tell all about it, the impression will be no greater; I do not expect to do any thing with you; I am going to send you home to your mother.

Smithers, for prisoner, objected to the introduction of any confession after this, as being brought about by promises, or inducements of favor. He cited, *Archb.* 112; 2 *Russ. Cr.* 826, 835-9, 644-5; 1 *Phil. En.* 81; *Swift Eb.* 132, 1; 1 *Greenl. Ev.* § 222.

Gilpin, attorney general, contra, cited, *Ros. Civ. Eu.* 34.

A majority of the court ruled out the confession.

Booth, *Chief Justice*.—It appears that the prisoner is a servant girl, between the age of twelve and thirteen years; and a shrewd, sensible and artful child. If she has such mental capacity as renders her amenable to the law for the commission of crime, she has sufficient mental capacity to make a confession of her guilt.

A confession, clearly proved to have been deliberately and voluntarily made, is among the strongest proofs of guilt. But it has been said by some eminent jurists, that, as verbal confessions are so often misunderstood or misrepresented, from a want of attention, the improper use of language, or the uncertainty of memory, they are at best, but a doubtful species of evidence; and at all times ought to be received with great caution. And where promises of favor or threats are used, the great danger is, that the confession, whether verbal or written, may be untrue; proceeding, not from a sense of guilt, but from the influence of hope or fear. In such cases, the confession is rejected. Therefore, a confession obtained by *temporal* inducement, by threat, or by a promise or hope of favor, having some reference to the party's escape from the charge, held out by a person in authority, is inadmissible. A master or mistress is considered as a person in authority, as well as a magistrate, sheriff, or constable. However slight the promise or threat may have been, the confession cannot be received. Therefore, where a party brought before a committing magistrate, and before he said any thing, was told by the magistrate's clerk, that what he said, would be used *for him*, or against him, on his trial; the confession was rejected: the learned judge remarking, that telling the prisoner, what he said would be used *in his favor* on his trial, was a direct inducement to him to make a confession. So where the prisoner was told, that it would be worse for him if he did not confess, or that it would be better for him if he did; and, where the prisoner was under the charge of murder, it was said to him, "you are under a suspicion of this, and

"you had better tell all you know," were held sufficient to exclude the confession.

The case now before the court is much stronger. Here is a servant girl between twelve and thirteen years of age, charged with arson, the punishment of which offence is death. One or two unavailing attempts had been made, to induce her to confess. Afterwards her mistress took her into another room, and questioned her whether she did the act. The child at first denied it. Her mistress then told her, "that she was suspected of the offence, and if she confessed it, the suspicion would not be stronger; that she (the mistress,) did not expect to do any thing with her, but was going to send her home." The prisoner then confessed, that when she went up stairs in the evening, she placed the candle under the clothes which hung from the bed. Here then is an inducement to confess; a promise of favor held out by a person in authority, and a hope raised in the mind of the child, that she would be sent to her home. Hence, a doubt and uncertainty arise, whether the confession was not made, more under the influence of hope, than from a consciousness of guilt. The prisoner's confession must therefore be rejected.

HARRINGTON, *Justice*, dissented.—The principle of the cases on this subject, is, that *any* promise of favor held out to a person, which *might* influence him to suppose it would be *better* for him to confess the crime, will exclude such confession from being given in evidence; for the danger is that this hope, thus held out to an agitated mind, might possibly induce an *untrue* confession of guilt. (2 Russ. Cr. 926; *Swift's Ev.* 131-2.) Mere persuasions, therefore, to confession, or indeed, urgent solicitations, will not exclude the confession, unless a prospect is presented to the mind of the accused, of advantage or benefit to be derived from the confession. The question is not whether what was said to the prisoner induced the confession, (for that would exclude every confession that was asked for;) but whether what was said to the prisoner induced the belief that a confession of guilt, would place him in a better condition than he was before confession; which would be holding out to him a real benefit. (2 Russ. Cr. 845-6.) All of the cases cited may be tested by this rule; and then we are only to inquire, not whether the remarks of Mrs. Fisher to the prisoner induced her to confess, but whether those remarks held out to her the prospect, or idea, that she would be in a better condition if she did confess, and thus presented a real inducement to the confession of a falsehood. (*Rex vs. Shepherd*, 7 C. & P. 579;

Archb. 110; *Rex vs. Thomas*, *Ibid* 345; 2 *Russ. on Cr.* 845; *Rex vs. Court*, *Ibid* 486, 846.) Apply to this rule the inducements held out by Mrs. Fisher. Were they calculated to impress the mind of the prisoner with a belief that it would be better for her to confess? Was any favor to be granted upon the confession, that would be withheld without it? Could the defendant have supposed that her situation would in any respect be bettered by making the confession? Mrs. Fisher says to her, "Elizabeth, the suspicion is general against you, and you had as well tell all about it; the impression will be no greater." Was there anything in this to make the prisoner believe she would be benefitted by a confession? much less was there anything to prompt her to confess what was not true, in hopes of a benefit held out. The suspicion was strong against her; and whether she confessed or not, she was told it would be the same thing. Just so of the declaration made by Mrs. Fisher, that, "she did not expect to do anything with her; she was going to send her home." Not if she would tell, she did not expect to do anything with her; but whether she told or not, she should be sent away. What possible operation this could have had on the mind of the prisoner to induce her to believe it would be *better* for her to confess her guilt, as placing her in a better condition, I cannot perceive; and I do not think there is anything in it which ought to exclude this confession.

Confession ruled out, and the prisoner was acquitted.

Gilpin, att'y. gen'l. for the State.

Smithers, for the defendant.



THE STATE vs. ELIAS HANDY, n.

Age of criminal capacity.

New Castle, Nov. sessions, 1845. The defendant was indicted for an assault on Amanda Smith with intent to ravish her. The prisoner was a boy between fourteen and fifteen years of age, and was proved to have assaulted a child of seven or eight years old with the intent charged.

Javier, for the defence, insisted that the jury could not convict the prisoner unless they were satisfied that he had the physical capacity to commit a rape.

The Court defined a rape to be the carnal knowledge of a woman, above the age of ten years, against her will; or of a female child, under the age of ten years, with or against her will; the law considering her incapable of consent. A boy under the age of fourteen years, is deemed by law incapable of committing a rape; and such a person could not be convicted of the offence of an assault with that intent; but, after fourteen years, he would be presumed capable, unless something appeared to the contrary.

The prisoner was convicted.



THE STATE *vs.* THOMAS NEWPORT.

The confession of a principal is not evidence against an accessory.

Indicted for feloniously receiving stolen goods, knowing, &c., to wit, a quantity of wool.

One Washington Brown had been indicted, tried and convicted on his own confession of stealing the wool, but sentence had not passed. His confessions were now offered in evidence against Newport.

Rogers.—The confession of a principal is not evidence as against an accessory. The very case has been decided by all the judges in England, on an indictment for receiving stolen goods. (*Ros. Evid.* 49, 50.)

The Court rejected the evidence.

Verdict, not guilty.

[*Note.*—In the case of the State *vs.* James Webb in Kent, Oyer and Terminer, June term, 1828, the same point was ruled. *Quere.* Could not Brown have been examined? A person is not convicted so as to render him infamous until *judgment*. *Greenl. Ev.* 444.]

PAYNTER SHORT *vs.* THE STATE.

In bastardy cases the general character of the prosecutrix for chastity may be inquired into.

A question may be put to a witness tending to criminate him, but he is not obliged to answer.

Sussex, October term, 1845. Appeal in bastardy.

The State proved the paternity of the child, by the mother, and closed.

Witnesses were called by the defendant, to impeach the character of the mother for chastity, and also to prove her intercourse with other men at or about the time.

The attorney general desired to inform these witnesses that they were not required to answer any question which tended to criminate themselves.

The Court said that this led to a question of some difficulty, which had been discussed in a case heretofore tried in this court; in which the decision was, that the question might be put to a witness whether he had had connection with the complainant, but that he was not bound to answer it; if he chose to protect himself under a claim of privilege. (4 T. Rep. 440; 1 M. & M. 108; Arch. Cr. Law 102; 1 Phill. Ev. 269, 223; Ros. Evid. 97.)

The court also permitted questions to be put and answered, as to the general character of the prosecutrix for chastity.

THE STATE *vs.* CALEB THOMAS.

Public roads: evidence of dedication.

Kent sessions, October term, 1845. The defendant was indicted for obstructing a public road leading from Robinson's Landing on Taylor's Gut to Carroltown school-house. The State proved the existence of the road for more than twenty years as a public road, and that the defendant closed it; but opened another road, within a few rods, on better ground than the old one. The old road passed through private woodland uninclosed; and the defendant's counsel contended that as there was no evidence that this road was ever *laid out as a public road* (though it had been used as such and repaired as such,)

the State was bound to prove an *adverse* possession and occupation by the public for twenty years, or the defendant, who was the owner of the woodland, could not be convicted of a nuisance in changing the road for a better one, both being on his property. Neither was the fact of working on this road by the overseer conclusive that it was a public road. It should be shown by his order that he was authorized to work on the road where it is now obstructed.

Gilpin, attorney general, replied, that the doctrine of conflicting claims as to lines, and of adverse or of mixed possession, did not apply to any other than questions of private right with which the public had nothing to do. In regard to the public the question is not who has the possession, but whether the public has the right of way, which may exist without any title to the soil. The question then is, whether by order of court, or by dedication, the public has acquired a right of way over the defendant's land at this place; and the exercise of that right for twenty years without interruption is evidence of such dedication:—

And the *Court*, charged, remarking so that in case of roads not laid out by order of court, though the uninterrupted use of the road for twenty years would give a right of way; yet where several roads traverse a common, or uninclosed land, in the same general direction, but in different places, at the pleasure of the passengers, such a mode of use ought not to be satisfactory evidence of a dedication, to take away from the owner of the land the right to inclose it; unless, in respect to some one of the roads, the enjoyment and use can be shown to have been uniform and uninterrupted for at least twenty years.

The defendant was convicted.



STATE vs. PETER FRAME and DAVID FRAME, negroes.

Property in several; larceny of, how laid.

Indictment, larceny of forty bushels of Indian corn in the ear; the goods and chattels of David Burton and Burton Hall.

The proof was, that the corn taken belonged to Burton Hall and David Burton, tenants, and to Henry C. Waples, landlord, being part of a crop raised on shares and undivided.

Mr. Cullen objected that the property should have been laid in Waples also. He cited, 3 *Johns. Rep.* 215, 220; 8 *Ibid* 151; 8 *Cow.* 220; *Archb. Pl.* 30.

The Court being of this opinion, the defendants were acquitted.



STATE *vs.* CHARLES KOCH.

Property of a minor; how laid.

The defendant was indicted for a larceny of jewellery and other articles of property belonging to Isabella Chadwick.

The defendant was a German, who could not speak or understand the English language, and the *Court* directed that two interpreters should be sworn to explain to him the accusation and evidence, and interpret between him and the court and jury.

Patterson, for the prisoner, objected that the property laid in one of the bills as the property of Isabella Chadwick, should have been laid as the property of her father, she being a minor and living with him; but the court thought the property well laid in the daughter, the articles being in her possession and being for her exclusive use. (*Ros. Ev.* 582; 2 *East P. C.* 654; 2 *Russ.* 160; 1 *Leach* 463.)



STATE *vs.* ABEL JEANS.

Presumptions as to freedom.

The defendant was indicted for imprisoning, with intent to kidnap, a certain Betsey Bungy; she being a free negro.

It was argued on the part of the defendant, that the prosecuting witness was incompetent to prove her freedom against a white man: that before the act of 1799, a negro could in no case be allowed to give evidence in a court of justice; and that since that act only *free* black persons can be admitted to give evidence, and then only where it shall appear to the court, before whom the prosecution is depending, that no white person competent to give testimony was present at the time when the fact charged is alledged to have been committed, or where such white persons, who were present, have since

died, or are absent from the State, and cannot be produced as witnesses.

On the other hand it was argued by the prosecution, that the law presumes every person to be free until the contrary is proved, and there being no proof of the slavery of the person whom the defendant is charged to have kidnapped, she must be taken to be free without proof. (*State vs. Dillahunt*, and *State vs. Griffin*, 2 *Harr. Rep.* 551-9, 60.)

Court.—It was originally considered, though it does not seem to have been *adjudged*, that in this State persons of color were presumed to be slaves; the presumption being founded as it has been said on the fact, that a large majority of persons of color were slaves. But the fact has long since changed; and it has been repeatedly decided that as a mere presumption, the inclination is in favor of freedom. It was so held prior to the case of Dillahunt, though that is the first case reported.

But neither that nor the other cases go any thing beyond a mere presumption of law where nothing appears contrary to it, and in cases where no proof is required to be superadded to it. According to these decisions a person of color is presumed to be free for the purpose of being a witness, but this presumption cannot supply full proof of a material fact which cannot be proved even by a free black. In accordance with these decisions, Betsey Bungy, when called to the stand, was sworn without proof of freedom; but, being sworn, she could prove as against the defendant, a white man, no fact capable of proof by white persons, such a fact as her own freedom is when that fact is involved in the substance of the crime charged.

In the case of the *State vs. Shockley*, Kent, Oct. term, 1835, (2 *Harr. Rep.* 531,) it was held that in an indictment against a free negro for larceny, if there be no *proof* of his being free he must be acquitted. In Griffin's case (3 *Harr. Rep.* 559,) it was *adjudged* that the allegation of freedom as contained in an indictment for kidnapping is a substantive allegation, and must be *proved*. And, although in that case, as in Dillahunt's case, and in another case of the *State vs. Griffin* (3 *Harr. Rep.* 551, 560,) it was held that a negro was presumed to be free for the purpose of being a witness, upon principles which favor the admission rather than the rejection of testimony, yet in no case has this legal presumption been held to supply the proof of a fact necessarily averred in an indictment, and necessary to be *proved* by the State. In both the cases against Griffin, though the persons kidnapped were allowed to be sworn as general witnesses, their freedom was also proved by other and competent testimony.

The question, therefore, of the competency of the proof in this case of the freedom of Betsey Bungy, does not depend upon legal presumption so much as on the competency of the witness to testify as to this fact. It is a fact necessarily averred in the indictment; necessary to be *proved* affirmatively by the State, and yet a fact which Betsey Bungy, whether free or slave, is not competent to prove against a white man, it being susceptible of other proof which is unobjectionable and competent.

Verdict, not guilty.



STATE *vs.* BURCHINAL.

Disorderly houses; liability of persons for disorderly conduct in and about their stores.

The defendant was indicted for keeping a disorderly house. It was proved that he was in the habit of selling liquor, and permitting it to be drank in his store, about which, there was frequently collected a crowd of persons, black and white, particularly on Saturday nights: that under the influence of liquor obtained at this store, they were noisy and riotous, cursing, swearing, dancing, and making loud noises, to the general disturbance of the neighborhood; as also, obstructing the streets, and jostling passengers: that this was done, not in the store, but on the footway and street in front of the store into which they were frequently seen passing and repassing, and where it was proved they bought the liquor.

On this evidence the defendant was convicted; and, after argument on a rule for a new trial, the court approved of the verdict.



The STATE, at the instance of A. ADAMS *vs.* G. BUZINE.

A judge, or justice of the peace, has power to order the arrest of a fugitive from justice from another State, before demand.

A regular demand under the act of Congress, and warrant of the governor to surrender a fugitive, is conclusive; and the court, or judge, cannot on habeas corpus inquire farther into the offence charged.

Habeas corpus before Chief Justice Booth.

The defendant made return that the petitioner was in his custody as

high constable and keeper of the common jail of the city of Wilmington, by virtue of a commitment under the *hand* of the mayor: that he was arrested on a warrant issued by the mayor, upon the oath of Henry Baker, of Centre county, Pennsylvania, setting forth that the petitioner, about the 25th of August, 1845, committed a larceny at the county and State aforesaid, of the goods of one Thomas Fitch, of the value of \$2,000.

The case was heard on the 22d of July, 1846, and was argued by *Mr. Bayard* for the petitioner, and *Mr. Huffington*, contra. The points made will appear from the following opinion of the chief justice.

Booth, Chief Justice.—The motion to discharge the petitioner, has been argued by his counsel, on three grounds; 1st. That as the common law considers crimes as local, and cognizable only in the State or country where they are committed, a person who has been guilty of a crime in a foreign State, and seeks shelter in another country, cannot be arrested and imprisoned in the latter, and delivered up as a fugitive from justice, unless by virtue of some treaty or compact on the subject; and then only, under a requisition, made in the manner which such treaty prescribes. That prior to the Constitution of the United States, this principle was applicable to the several States; because being separate and independent States, they were then to be viewed as foreign to each other: that since the adoption of the Constitution of the United States, all offender, who has perpetrated a crime in one State, and takes refuge in another, cannot be arrested and imprisoned in the latter, to be delivered to the civil authority of the former, except by virtue of the second section of the fourth article, and the act of Congress, passed the 12th of February, 1793, for the purpose of carrying into effect the provision of the constitution: and, therefore, that no magistrate within this State, can issue process against a person who has committed a crime in another State, and seeks refuge here, until a demand has been made by the executive of the former, upon the executive of this State, and a warrant issued by the latter, to arrest and secure the criminal.

2d. The second ground relied upon is, that the warrant of commitment in this case, not being under seal, is insufficient and void.

3d. The third is, that admitting all the facts deposed to by the witnesses, and appearing from the written evidence, to be true, they do not constitute a larceny.

1st. Many eminent jurists maintain the doctrine, that by the law of nations, it is the duty of every State, to deny an asylum to the

perpetrators of atrocious crimes committed in other countries, against the rights of private property and personal security : and that it is a further duty, to surrender the fugitive to the sovereign State where the crime was committed. This doctrine is ably supported by Chancellor Kent, in the case of Daniel Washburn, *4 Johns. Ch. Rep.* 108. But the weight of legal decisions, and the uniform course and practice of the government of the United States are opposed to it. So, also, is the opinion of a majority of the judges of the Supreme Court of the United States, in the case of Holmes *vs.* Jennison, *14 Peters* 540, although the point was not directly decided, the writ of error having been dismissed, as the court were equally divided on the question of jurisdiction. The law may be considered as settled in the United States, that the right to demand and the duty to surrender a criminal, who flies from a foreign country, exists only by virtue of treaty stipulations; and in such case, that the power of surrendering, must be exercised by the President of the United States. But where separate States or Territories are parts of the same empire, under one common sovereign or government; a person who commits a crime in one part, and seeks shelter in another, may be arrested in the latter, and sent for trial where the offence was committed; or may be detained in prison for a reasonable time, to allow an application to be made, to deliver him up to the proper authority, for the same purpose. This is a principle of the common law, founded in the common welfare and safety of society. Hence, a person who commits a felony in Ireland, and flies to England or Scotland, may be arrested and imprisoned until he can be sent to Ireland for trial. (*Col. Lundy's case*, *2 Ventris* 314; *Rex vs. Kimberly*, *2 Strange* 848.) So too, a person may be arrested in England and sent to Calcutta, to be tried for an offence committed there. (*East India Company vs. Campbell*, *1 Vesey* 246.) So also, prior to the American revolution, when the United States were colonies, and composed part of the British Empire, a criminal, who fled from one colony, found no protection in another. He was arrested whenever found, and sent for trial, to the place where the offence was committed. (*Commonwealth vs. Deacon*, *per. Tilghman C. J.*, *10 Serg. & Rawle* 123.) This principle of the common law certainly was not abrogated by the colonies severing the ties which bound them to the mother country, and uniting themselves under an independent national government. It was not, therefore, derived from the constitution, but existed independently of it. The second section of the fourth article of that instrument was intended to make the arrest and surrender of

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the criminal, on demand of the executive authority of the State from which he fled, an imperative duty; and not to depend on the discretionary exercise of a right or power. This duty, by the first section of the act of Congress of 1793, is imposed on the executive authority of the State to which the criminal has fled. To enable the executive to perform this duty it is necessary that magistrates should have the power to arrest and commit the fugitive, before, as well as after a demand has been made. If prior to the adoption of the constitution, he found no protection in the State to which he fled; since then, no reason exists why an asylum should be afforded to him, until a demand is made on the executive of the State where he seeks refuge, and a warrant issues to arrest and secure him. The exercise of the power is essential to carry into effect the provision of the constitution; otherwise an immunity may be afforded to the most atrocious criminals. If a felon notoriously guilty of a murder, can, by escaping into another State, set the law at defiance, until a demand is regularly made on the executive, and a warrant is issued for his arrest, the object of the constitution may be defeated, and the act of Congress rendered nugatory. By the time a requisition is obtained, and a warrant granted, in due form, the offender may fly to another State; where he again finds a sanctuary, until the same formalities are repeated. He may thus escape from State to State, exempted by his own vigilance, or that of his friends, from arrest and punishment. In the case before cited, (*Com. vs. Deacon*, 10 Serg. & Rawle,) Chief Justice Tilghman says, "that when the executive has been in the habit of delivering up fugitives, or is obliged by treaty to do so, the magistrates may issue warrants of arrest of their own accord, on proper evidence, in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminal. On this principle we arrest offenders, who have fled from one of the United States to another, even before demand has been made by the executive of the State from which the fugitive had fled." It is the constant practice in several States to do so; and is required by the principles of justice for the safety of the community. My opinion, therefore, is, that any judge or justice of the peace in this State, or the mayor of the city of Wilmington, upon probable cause supported by oath or affirmation, has the power to issue a warrant to arrest and bring before him, a party suspected of having committed a crime in another State, before a demand has been made by the executive of such State; and that after examination, upon such proof, or probability, of the party having committed the offence, as would

be sufficient to put him upon trial; it is the duty of the magistrate to commit him to prison, for such reasonable time, as will allow notice to be given the executive authority of the State, where the offence was committed, and a demand to be made, pursuant to the act of Congress, for the surrender of the fugitive.

2d. The second ground relied on by the petitioner's counsel, is the insufficiency of the warrant of commitment. The law requires every final commitment to be in writing, and under the hand and seal of the magistrate who makes it. It must show his authority; the time and place of making it; and must be directed to the keeper of the prison. The present warrant of commitment is defective; because it is not under the seal of the mayor. But in my opinion, the petitioner is not entitled to his discharge, on account of the insufficiency of the warrant; provided, the facts disclosed by the evidence, afforded a reasonable presumption that he is guilty of the offence imputed to him, or such probability as would be sufficient to put him upon his trial. If such were the case, although I should discharge him from imprisonment under the warrant of the mayor, I should consider it my duty to order him to be immediately committed to the public gaol of New Castle county, for a reasonable time to give notice, and await the demand of the executive authority of Pennsylvania. If no demand should be made within such reasonable time, it would become my further duty, to make a final order for his discharge.

3d. As to the third ground. Admitting all the facts deposed to by the witnesses, and shown by the letters and other documents between the parties, to be strictly true, they do not constitute a larceny. Fitch was the owner of a clothing establishment at Bellefonte, Centre county, in the State of Pennsylvania, but resided at Schuylkill Haven, in Schuylkill county. Under articles of agreement between him and Adams, fairly made, without any fraud or deception on either side, possession of the store and goods was delivered to the latter, who had the entire management and control of the whole business. He hired and paid the hands; cut out garments; sold ready-made clothing; received the amount of sales; kept the books of accounts; and was to settle with Fitch for the proceeds of the business, after deducting a certain per centage as a compensation. Adams embezzled goods and money to a large amount, without anything ever having been done to determine the privity of contract under which the possession had been delivered to him. His conduct is a gross breach of trust, involving as much moral guilt as theft; but does not amount to a larceny. It has not been shown to constitute

a criminal offence, punishable under any statute of Pennsylvania. The only remedy of Fitch, is by a civil suit. It is, therefore, ordered, that the said Alexander Adams be discharged from his imprisonment under the commitment of the mayor of the city of Wilmington.

After the discharge of said Alexander Adams upon the foregoing writ of habeas corpus, he was taken by the sheriff of New Castle county, upon a writ of habeas corpus at the suit of Thomas Fitch, and held in custody for want of bail. A rule to show cause of bail was granted by Chief Justice Booth, on behalf of Adams; and at the hearing of the rule, on the 28th of July, 1846, no affidavit being produced, he was discharged on filing common bail. He was immediately afterwards arrested and delivered into the custody of Edmund Schlemn, a police officer of the city of Philadelphia. On the same day, upon the petition of Adams to the chief justice, a writ of habeas corpus was awarded, directed to the said Schlemn, returnable forthwith. A return was made, containing a copy of a requisition made by Francis R. Shunk, governor of the State of Pennsylvania, upon the governor of the State of Delaware, setting forth, that said Alexander Adams was charged on the oath of said Thomas Fitch, with having committed the crime of larceny at Centre county, in the State of Pennsylvania, in August, 1845; that he had fled from justice and had taken refuge in the State of Delaware; and demanding that he should be arrested and delivered up to the said Schlemn, the agent of the State of Pennsylvania, duly appointed and commissioned to receive and convey the said Adams to Pennsylvania, to be dealt with, according to law. Annexed to the requisition was a copy of the affidavit of Fitch, made before a magistrate in Pennsylvania, and certified, although not formally, as authentic, by the governor of that State, and charging Adams in due form of law, with having committed a larceny at the town of Bellefonte, in Centre county, and State of Pennsylvania, in feloniously stealing, taking and carrying away, in August A. D., 1845, sundry cloths and garments of the value of two thousand dollars and upwards, of the goods and chattels of said Thomas Fitch. The return also set forth a copy of the warrant of the governor of the State of Delaware, issued in the name of the State, to arrest and deliver the said Adams, into the custody of Schlemn, as the agent of the State of Pennsylvania. The return also set forth a copy of the appointment of Schlemn under the great seal of Pennsylvania. The originals of the two last mentioned docu-

ments, and copies of the others, certified in due form of law, were produced at the hearing of the cause.

Mr. James A. Bayard, for the prisoner, moved for his discharge, principally on the ground that at the hearing of the preceding habeas corpus, it had been clearly shown that he was not guilty of a larceny, but simply of a breach of trust; and that it manifestly appears, that the present charge is founded on the same transaction. The motion was opposed by *Mr. William Huffington*, counsel for Fitch, the prosecutor, on the ground, that no court or judge in this State, has power to discharge a person guilty of, or charged with, an offence committed in another State, and who, by the Constitution of the United States, ought to be delivered up to the executive of such State: or to discharge any person imprisoned by the authority of the United States. (*Habeas Corpus Act, sec. 4, Dig. 295.*) He contended that Adams was imprisoned by the authority of the United States; and cited the opinion of Pope, United States district judge in Illinois, in the case of Joseph Smith, the mormon prophet, 6 *Law Reporter* 58.

Booth, Chief Justice.—Every person in this State who is restrained of his liberty under any color or pretence whatever, either for a civil or criminal cause, and apprehends, or is advised, that his imprisonment is illegal, is entitled, as a matter of right, to the writ of habeas corpus; unless his petition clearly and distinctly shows, that he is legally detained for treason or felony, plainly and fully set forth in the warrant of commitment; or detained under the judgment or process thereon, of a court of competent civil or criminal jurisdiction; or that he is legally imprisoned by the authority of the United States, or detained for such other legal and sufficient cause, as satisfies the court or judge, that no relief could be granted to the petitioner upon the return of the writ. It is in the nature of a writ of error to examine into the legality of the commitment; and for that purpose, to bring up the body of the prisoner with the cause of his detention. Suggestions or exceptions against the return may be filed, for the purpose of ascertaining material facts, to enable the court or judge to determine whether the party ought to be bailed, remanded, or discharged. In cases of imprisonment under warrants from our magistrates, for offences committed within this State; or for offences perpetrated in another State, and the accused is committed to await the demand of the executive authority of such State, an inquiry is made into the circumstances of the case, to ascertain the material fact, whether there is such proof, or reasonable presumption of guilt, as would be sufficient to put the party on trial. But if the return

alleges, that the prisoner was committed and is detained by virtue of the judgment, and process thereon, of a court of competent jurisdiction, the existence of such judgment and process, is the material fact to be ascertained. When ascertained, it is a sufficient legal cause for the prisoner's detention, and precludes all further inquiry. The court or judge awarding the habeas corpus, cannot examine into the matters on which the judgment was rendered, but must remand the prisoner. So in like manner, if the return to the habeas corpus sets forth, that the party is a fugitive from justice, that he was demanded as such, and was arrested and committed for the purpose of being surrendered; the only inquiry is, whether the provisions of the act of Congress of 1793 have been complied with. If that fact is shown by the return, and by the warrant of the executive authority under which the fugitive has been arrested, it constitutes a just and legal cause for his imprisonment and detention. The right and power under the Constitution of the United States, and the first section of the act of Congress of 1793, to demand, arrest, commit, and surrender fugitives from justice, are exclusively vested in and confided to, the executive authority of the State from which the fugitive has escaped, and that of the State where he has taken refuge. To authorize the latter to take cognizance of the case, and to perform the duty imposed upon him, the act of Congress prescribes 1st. That the demand shall be made by the executive of the State from which the fugitive has fled. 2d. That a copy of an indictment found, or of an affidavit made before a magistrate, charging the person demanded with having committed a crime, shall be produced with the demand. 3d. That such copy of the indictment or affidavit shall be certified as authentic by the executive of the State from whence the person so charged, fled. These matters are entrusted to the judgment of the executive upon whom the demand is made; and if his mind is fully satisfied in regard to them, the act of Congress makes it his imperative duty to cause the fugitive to be arrested, and delivered up to the regularly constituted agent of the State from which he fled. The warrant of the executive under the great seal of the State, reciting the facts necessary, under the act of Congress, to give him jurisdiction of the case, would in my opinion, at the hearing of the habeas corpus, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the Constitution of the United States and the act of Congress. No investigation therefore in such a case, can be made beyond the warrant of the executive, and no examination into the

facts and circumstances of the alledged offence with which the party stands charged. The case would not be within the operation of the habeas corpus act of this State, even were it not expressly excepted by the fourth section. (*Dig.* 295.)

In the present case, the return fully sets forth copies of all the documents transmitted by the governor of Pennsylvania to the executive of this State, with the warrant of the latter, and the appointment of Schlemm as the agent of the State of Pennsylvania, to receive the petitioner, as a fugitive from justice, and to carry him to that State. It appears that all the requisites of the act of Congress have been complied with. No suggestions or exceptions have been made to the return. It is, therefore, admitted to be true. And, although my belief is that the alledged offence with which the petitioner is charged is the same which, upon the examination of witnesses at the hearing of the former habeas corpus, clearly appeared to be a breach of trust, and not a larceny, he must be remanded, because the return in this case, is conclusive. When taken to Pennsylvania, he can obtain relief, if the circumstances of his case entitle him to it, by suing out the writ of habeas corpus. It is therefore ordered, that the petitioner be remanded to the custody of Edmund Schlemm, to be taked by him to Pennsylvania, there to be dealt with according to law.

Adams was taken to Pennsylvania, and put in prison at Bellefonte. He there obtained the writ of habeas corpus; and, after an examination into the facts of the case, he was discharged, on the ground that they did not constitute a larceny, but amounted merely to a breach of trust.



In the matter of a return of a *private* road on the petition of GEORGE HICKMAN.

The act authorizing the laying out of private roads is constitutional.

Exceptions filed by James Rowland.

Mr. Layton objected to the confirmation of the return, on the ground that section ten of the act of assembly concerning roads and bridges, authorizing the laying out of private roads is unconstitutional. (*Art. 8, sec. 1, Const. Del.; 5 Art. Const. U. S. Amendts.*)

Private property is sacred under our constitutions from being taken for any other than public use. (*3 Story's Com.* 661, § 1784; *2 Dall. Rep.* 304-7-10; *3 Ibid.* 386, *Calder vs. Bull*; *1 Hurr. Rep.* 77, 82; *1 Baldu. C. C. Rep.* 219; *1 Rev. Stat. N. York* 517, § 77; *13 Wend. Rep.* 328; *4 Hill's Rep.* 76, 140; *2 Kent Com.* 13, 340; *11 Wend. Rep.* 149; *18 Ibid.* 59; *19 Ibid.* 659; *5 Paige's Rep.* 137.)

Mr. Cullen declined replying.

The Court overruled the exceptions and confirmed the return.

The authority to lay out private as well as public roads has been exercised under laws similar to the present from the beginning, without question. It is within the legislative control in exercise of eminent domain of which it is a part. The land is taken for public use, though upon private petition. It is a part of the system of public roads; essential to the enjoyment of those which are strictly public; for many neighborhoods as well as individuals would be deprived of the benefit of the public highway, but for outlets laid out on private petition, and at private cost, and which are private roads in that sense, but branches of the public roads and open to the public for the purposes for which they were laid out. Just compensation is made to the owner of the land for individual damage, and the public resumes the occupation and use of it so far as is necessary for the common good, by virtue of a right paramount to that of individual property.



THE STATE *vs.* ISAAC UPDIKE.

Re-trial had in a criminal case, at the same term; the first jury having been discharged by the court.

New Castle, May term, 1847. Indictment, kidnapping William Hogans, negro.

This case was tried on a previous day of this term; and the jury being unable to agree, after being up all night, were discharged by the Court from rendering a verdict.

It now came up again before another jury, and the defendant was convicted.

Bayard, jr., moved to arrest judgment, on the ground that the jury having been discharged in the former case without the prisoner's consent, he could not be tried again without putting him twice in jeopardy; but he afterwards withdrew his motion, being satisfied that the ground was not tenable. (See *9 Wheat. Rep.* 597.)

THE STATE *vs.* JAMES HARTEN.

Discharge on a petition for freedom, founded on the illegal exportation of petitioner by his master, is evidence of his freedom, on an indictment for kidnapping him. The general reputation of a kidnapper is evidence of the intent with which defendant aided him in carrying off a free negro.

Kent, October term, 1847. On the trial of James Harten, who was indicted with Jacob R. Griffin and others, for kidnapping one Peter Howard, a free negro, with a count for aiding and assisting Griffin to kidnap, it was ruled,

1st. That the record of Peter Howard's discharge on a petition for freedom filed against his former master for selling him out of the State, was sufficient evidence of his being a free negro.

2d. That the general reputation of Jacob R. Griffin as a kidnapper might be given in evidence, to show the intent with which the defendant aided him in binding and carrying off the said Howard.

The defendant was convicted.

THE STATE *vs.* SAMUEL D. BURRIS, n.

Change of venue.

Kent sessions, 1847. Indicted for enticing and aiding slaves to run away.

Wales and Bates, for the prisoner, moved the entry of a suggestion on the record in order to change the venue to New Castle county, and obtained a rule to show cause founded on an affidavit of the defendant, that he *believed* he could not have an impartial trial on account of prejudice and public excitement in Kent, and the fact that sundry jurors were slaveholders, or relations of slaveholders; that several persons who came to Dover to be bail for the defendant were assailed and maltreated on the public highway; and several persons were actively employed in endeavoring to procure his conviction, and had contributed funds for that purpose; and swearing to a good defence on the merits as the defendant was advised and believed.

This affidavit was also confirmed by another from *Ezekiel Cowgill*, stating in general terms the existence of prejudice and *his* belief that an impartial trial could not be had in Kent.

The defendant's counsel argued, that his affidavit was the proper ground for this application, as the nature of the question would not properly admit of its investigation on testimony prior to the trial. They said the right to a change of venue was recognized by the constitution, and should be accorded whenever there was reasonable ground to believe it was necessary to procure a fair trial, and the defendant's affidavit afforded such ground. They offered, however, to submit to any form of investigation into the truth of the grounds alledged in the affidavit which the court might approve of. (3 *B. & Ald.* 448; 5 *Com. Law Rep.* 342.)

Smithers and *Bradford*, for the State, replied, denying that it was a matter of right to demand a change of venue, but *ex gratia* when the court is convinced that an impartial trial cannot be had; and that this was matter of proof. They cited 1 *Harr. Dig.* 2170; 2 *Nev. & Man.* 167; 1 *Ibid.* 312; *Ros. Ev.* 188; 4 *Barn. & Ald.* 573. The affidavit must state facts and not belief. (3 *Burr. Rep.* 1330; 2 *Wend.* 250; 7 *Cow. Rep.* 137; 7 *Hill's Rep.* 147.)

By the Court:

Booth, Chief Justice.—The right to an impartial trial is undoubtedly a constitutional right, but it is also a common law right, and was at common law as fully recognized as it can be under the constitutional provision. It is in the same words with magna charta in 1215, which was itself but a recognition of the common law. It was inserted in the constitution as an express recognition to prohibit any legislative violation of the right; but it would have existed, and have been recognized by any common law court, if it had not been inserted in the constitution. The constitution and common law therefore, equally require, that trials shall be impartial; but the necessity of changing the venue in any case, in order to secure an impartial trial, is not to depend on the suggestion or even the belief of the defendant, but upon facts shown to the court, or admitted, sufficient to satisfy the court that the change is necessary to procure an impartial trial.

The matters stated in these affidavits are matters of opinion and belief, except as to three allegations, viz:—that certain of the jurors are slaveholders, or relatives of slaveholders; that persons who came to Dover to be bail for defendant, were assailed and assaulted, and that money had been contributed for the purpose of procuring the defendant's conviction. As to the first of these, it would, if proved, be no cause of changing the venue, but there is no proof of it; nor of the fact of maltreatment of the defendant's bail in Dover, which

if it had happened, would not show that an impartial jury could not be had from the body of Kent county. As to the allegation that persons are engaged and have used money to procure the defendant's conviction, if it means merely that counsel have been employed to assist the prosecution, there is nothing objectionable in that; if it intimates a corrupt use of money, the instances should be specified, and some proof at least of it, offered.

The cases cited do not support the position implied by the defendant's application, that the right to a change of venue rests upon his own affidavit alone. Like any other affidavit, the facts stated in it are traversable, and it must be sustained: the opinions or belief are of even less importance.

The case therefore resting on the unsupported affidavit of the defendant, except by the affidavit of one very respectable citizen, who affirms to the same general belief, the court are compelled to refuse the application, and discharge the rule. If we should sustain the application on such ground, there is scarcely any case of high crime in which we should not be compelled to change the venue; for in all such cases there is more or less of public excitement, from which the defendant or accused may apprehend his case will be prejudiced; but which we are far from admitting in the full extent, as establishing that an impartial trial cannot be had in this county. Much indignation and excitement may exist in relation to the crime, without being unduly directed to the accused; and we have every confidence that whatever may be the sense of this community in relation to the offence of aiding the escape of slaves, the sense of justice in the people generally, and particularly in the jury present, is much stronger, and will insure a perfectly fair and impartial trial of any one accused of this offence, however humble he may be.

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Suspicious circumstances, notice, &c., require the utmost diligence. *Redden v. Spruance et al.*, 217.

Stage proprietors are liable for knowingly taking a slave as a passenger. *Ibid.*

Carriers are bound to inquire with due diligence into the condition of colored passengers. *Ibid.*

CONSTABLE.

In an action against a constable for neglecting to execute process, he cannot plead the defectiveness of his writ, unless it be for want of jurisdiction. *Coverdale v. Fowler*, 858.

If one constable deliver an execution in his hands to another for collection, the latter is not liable to plaintiff on his bond, but may be sued in *assumpsit*. *Pettijohn v. Hudson*, 178.

A constable cannot make a levy after the return day of his writ. *West v. Shockley et al.*, 287.

If the levy be duly made the property may be taken afterwards. *Ibid.*

A constable having levied on goods may take possession of them by force if resisted. *Saunders v. Milward et al.*, 246.

A constable cannot be charged under the act of 1833 for neglect of duty, without showing process regularly in his hands. *Rash v. Parris*, 81.

A purchaser at a collector's sale for taxes is not bound to see to the regularity of the proceedings. *Tigheon v. Cruson*, 341.

If the sale be authorized, its regularity cannot be collaterally questioned. *Ibid.*

CONSTITUTIONAL LAW.

The act authorizing the laying out of private roads is constitutional. 580.

Quare. As to the constitutionality of special divorce laws since the act of 1832 giving jurisdiction to the court. *Townsend v. Griffin*, 440.

An act of limitation barring remedies before the accruing of the cause of action, is unconstitutional. *Layton v. State*, 8.

Law is a rule of conduct prescribed by legislative power for the government of the citizen. *Rice v. Foster*, 479.

Legislative power is vested in the *General Assembly*, consisting of a Senate and House of Representatives. *Ibid.*

CONSTITUTIONAL LAW.

The people have *divested* themselves of all legislative power, and *vested* it in this body. They can resume it only in the forms of the constitution, or by revolution. *Ibid.*

The General Assembly cannot delegate legislative power to any other body or person; not even to the people at large; nor can they make it to depend on the assent or approval of any other. *Ibid.*

The citizen is bound to obey the *will* of the legislature as *prescribed* in the written statute. If the statute in itself give no evidence of *legislative will*, as a rule of conduct, the citizen cannot obey it; if it subject the legislative will to any other will, the citizen is not bound to obey it. *Ibid.*

The act of 1847, "authorizing the people to decide by ballot whether the license to retail intoxicating liquors shall be permitted among them," expresses no *legislative will* on this question; *prescribes no rule of conduct* for the government of the citizen; and *delegates legislative power* to the people of each county. *Ibid.*

The state has the right of a proprietor over navigable streams entirely within its borders; and may obstruct, or (unless where restricted by the Constitution of the United States) may close up such streams at pleasure. *Bailey v. R. R. Co.*, 389.

Such rivers are public highways, and open to all for navigation and fishery; but the legislature may impair or take away these rights for public purposes. *Ibid.*

Riparian proprietors have no individual rights to a river, and are entitled to no compensation for the loss of those easements which they hold in common with other citizens. *Ibid.*

An obstruction of a river, authorized by the legislature, gives no right of action. *Ibid.*

An unauthorized obstruction is a public offence, and no ground of private suit. *Ibid.*

The act of Assembly of 1837, authorizing the erection of a close bridge over White Clay Creek, is constitutional; and gives no right of action to mill owners above for obstruction of the water. *Ibid.*

Such bridge must be made, and kept up, in conformity with the law; any additional obstruction, attended with special damage, is actionable. *Ibid.*

An act giving a right of action for *authorized* obstructions passed after they were made, and not accepted by the railroad company, is a violation of their charter, and of the obligations of the contract with them; and, therefore, unconstitutional. *Ibid.*

An act giving a remedy by summary action for *unauthorized* obstructions is constitutional, though passed after the injury sustained. *Ibid.*

The assessment of damages by a jury of inquest, returnable to court, is a constitutional mode of trial in such cases. *Ibid.*

The Supreme Courts of a state are obliged to decide on the constitutionality of laws; and, in cases of plain and apparent opposition, to pronounce them void. *Ibid.*

COSTS.

Where the heir at law contests a will on reasonable grounds, the costs fall on the estate. *Ross v. Hearn*, 101.

The proper costs for defending a will shall be allowed the executor. *Ibid.*

Costs on caveatting a will: by whom paid. *Ibid.*

COSTS.

The court will not tax the costs of witnesses summoned to support others not examined. *Brittingham v. Collins et al.*, 298.

A sheriff is not entitled to "dollarage" for money not made by him; unless it is paid before the return day of the writ, or whilst he had process in hand authorizing him to levy it. *Lofland v. Jefferson*, 303.

The costs of witnesses summoned without due caution, will be disallowed. *West v. Shockley et al.*, 287.

COVENANTS.

Covenants, mutual and independent: conditional: concurrent:—construction of. *Houston v. Spruance*, 117.

Where mutual covenants go to the whole consideration, they are conditions. *Ibid.*

Where a day is fixed for payment for a thing to be done, if such day is beyond the time the act is to be done, it is a condition precedent, and the obligation of payment is conditional. *Ibid.*

H., a mail contractor, under a schedule, to commence from 1 Jan., 1840, sold it to G. for \$1600, payable in cash on or before the 1st Jan., the contract to be assigned, &c. Held, that plaintiff could not recover the \$1600 without showing an assignment or readiness to assign. *Ibid.*

DAMAGES.

A party may recover damages for a collision on the highway who may not have been entirely without fault, if he did not contribute directly to the collision. *Cummins v. Spruance*, 315.

No one has a right to obstruct a navigable stream, but the occasional grounding of a vessel is an obstruction incident to commerce, and not unlawful. *Ibid.*

Exemplary damages may be given for a wilful collision of vessels. *Steamboat Co. v. Whilldin*, 228.

For mere negligence or ignorance, the damages in case of collision are merely compensatory. *Ibid. Cummins v. Spruance*, 345.

Nothing can be recovered for collision of vessels arising from *mere accident*. *Ibid. Cummins v. Spruance*, 315.

Exemplary damages may be given in trespass, assault and battery, though the defendant has been convicted and fined for the public offence. *Jefferson v. Adams*, 321.

Damages for detention of dower are recoverable, as against the alienee of the husband, only from the time of demand and refusal. *Layton v. Butler*, 507.

DEED.

The deed of an infant conveying land is voidable at full age, but until avoided the party in possession under it is not a *trespasser*. *Wallace's lessee v. Lewis*, 75.

Such deed must be avoided within a reasonable time after full age. *Ibid.*

A deed of manumission executed by an insolvent to defraud creditors, is void. *Dulany v. Green*, 285.

The deed of a drunken man is void. *Ibid.*

A deed to A., B., and C., their heirs, &c., in *trust* for the grantors for life, and then for the use of grandchildren, conveys the legal estate, as an *executed use*, in the *cestui que use*; and is not a *trust estate* in the grantees. *Jones v. Bush et al.*, 1.

DEED.

A deed executed, acknowledged, and recorded, held void for non delivery; it being clearly proved that there was no intention to deliver it. *Jones v. Bush et al.*, 1.

The acknowledgment of a deed before a notary public must be *within* the state. *Harris' lessee v. Burton*, 66.

A married woman cannot make a valid deed of her own land, so as to bind herself, without her husband. *Ibid.*

DEMAND. (See **BILLS AND NOTES**,) p. 234.

DEVISE.

A devise of land to executors to sell for payment of debts, is a conversion of it "out and out," applicable to pecuniary legacies. *Sharpley v. Townsend*, 336.

A devise of "all my real and remainder of my estate," without any words of limitation, will carry *a fee*. *Dunovan v. Dunovan*, 177.

The word "estate" in a will, includes the interest as well as the corpus of the land. *Ibid.*

DISORDERLY HOUSES.

Liability of persons for disorderly conduct in and about their stores. *State v. Burchinal*, 572.

DITCHES. (See **ROADS**,) p. 452.

The treasurer of a ditch company, under the general ditch law, cannot be sued, on the managers' orders, without acceptance. *Watson v. Lofland*, 60.

Such orders must be drawn by both managers. *Ibid.*

The managers are liable to laborers; not the treasurer. *Ibid.*

DOWER.

Dower is a common law right; the mode of assignment is under statute provisions. *Layton v. Butler*, 507.

The statutes of Merton and Westm., 1, are in force here. *Ibid.*

The act of 1816 was made to relieve dower of the incumbrances of the husband. *Ibid.*

Damages for detention of dower were given by the stat. of Merton, from the death of the husband, *as against the heir*. *Ibid.*

A suit of dower *abates* by the death of defendant, and cannot be prosecuted even for damages for detention. *Betts v. Matthews*, 427.

In a suit for dower, plaintiff recovered against a purchaser on a judgment entered the *same day* of the marriage, there being no proof which occurred *first*. *Ingram v. Morris*, 111.

Damages for detention of dower are recoverable, *as against the alienee of the husband*, only from the time of demand and refusal. *Layton v. Butler*, 507.

The reversioner may sue tenant in dower for injuries to the inheritance, though there be another intermediate life estate. *Short v. Piper et al.*, 181.

DURESS.

A security given, in prison, on lawful process, is not void for duress. *Waterman v. Barratt*, 311.

EJECTMENT.

Ejectment will not lie against a person coming in as a tenant, without notice to quit. *Horsey v. Horsey*, 517.

One coming in as tenant to a tenant for life does not, upon his death, become the tenant of the remainder man, without his assent, express or implied. *Ibid.*

ELECTIONS.

Liability of election officers for taking illegal votes. *State v. McDonald*, 555.

Proof of guilty knowledge. *State v. Porter*, 556.

Residence: evidence of intention to change domicil. *State v. Frest*, 558.

Sect. 24 of the act of 1825, regulating the general election, is not repealed by the act of 1845. *State v. Harker*, 559.

Distinction between "offering" and "promising" a bribe. *Ibid.*

EQUITY.

Relief in equity cannot be decreed as on a case not stated by the bill. *Jones v. Eush et al.*, 1.

The principle of acts of limitation is adopted in equity. *Perkins v. Cartwell*, 270.

A Court of Equity refuses aid to a stale demand independent of limitation. *Ibid.*

ERROR. (See PRACTICE,) p. 265.

ESTOPPEL.

A fact recited in a deed will be taken to be true against the parties to the deed, and all claiming under them; and they are estopped from denying the truth so recited. *Inskeep v. Shields*, 345.

A person petitioning for a grant of vacant land, and accepting the grant, is estopped to deny that it is vacant land. *Tubbs v. Lynch*, 521.

EVIDENCE.

Scraps of paper admitted as book entries. *Smith v. Smith*, 532.

The receipt of an heir at law, or ward, sealed and acknowledged, is conclusive evidence. *Oullen v. Knowles*, 533.

A witness may refresh his memory by a paper written at the time, but must swear from memory, and not from the paper. *Redden v. Spruance et al.*, 217, 265.

A written memorandum may be used to refresh memory, but is not evidence. *Ibid.*, 217.

Parol evidence is admissible of fraud or mistake in making a will, or other evidence which contradicts the *factum*. *Hearn v. Ross et al.*, 46.

A party justifying under execution process, must show the judgment, execution, and levy. *Truit v. Revill*, 71.

A will cannot be explained by parol evidence unless there be a latent ambiguity. *Hearn v. Ross et al.*, 46.

In the action of slander the defendant's circumstances as to property cannot be given in evidence. *Morris v. Barker*, 520.

Under the general issue the defendant may prove previous reports of plaintiff's guilt, to reduce the damages and disprove malice. *Ibid.*

Malice is implied from charges of an indictable offence. *Ibid.*

Book entries not proper evidence of matters not properly chargeable in account. *Redden v. Spruance et al.*, 217.

EVIDENCE.

A witness, whose deposition has been read, may be called to testify to matters not embraced in his deposition. *Hatfield v. Perry*, 463.

The books of a party being evidence, with his oath, of a sale and delivery of goods; he may be cross-examined on this point. *Fredd v. Eves*, 38.

A patent from the state presumed on proof of a warrant 103 years old, located 67 years, with 88 years' possession. *Wall's lessee v. Magee et al.*, 108.

The investigation of a dispute between members of a church, by a committee of the church, has no effect on their legal rights, and the award of the committee is not evidence. *Tubbs v. Lynch*, 521.

"Partnership" is a question of law. It may be inferred from circumstances. *Gilpin v. Temple et al.*, 190.

Common reputation is evidence of partnership, if shown to be founded on the acts of the party to be charged. *Ibid.*

The acts, &c., of one person, are not evidence to prove partnership to charge another. *Ibid.*

Book entries, when evidence, and for what purpose. *Hatfield v. Perry*, 463.

Entries by a notary are evidence of demand and notice, but the notary must be called, if living. *Ibid.*

The mere certificate of notarial protest is not sufficient evidence. *Ibid.*

A colored person may prove his book of accounts in an action against a white man. *Webb v. Pindergrass' administratrix*, 439.

A party may prove his books whether kept by himself or by another. *Ibid.*

Thirty years' possession will not give title as against the state. *Wall's lessee v. McGee et al.*, 108.

The statement filed before a justice of the peace in an action of trespass is not evidence on appeal. *Townsend v. Steward*, 94.

Mode of authenticating records under the acts of Congress. 435.

The signature of a witness attests the execution of an instrument signed by a mark. *MDermott v. McCormick*, 543.

A will destroyed by the heir at law admitted to probate on proof of its contents by one witness, and rough draft; the proof of execution being full. *Kearns v. Black*, 83.

Judgment in a former suit evidence only between parties or privies. *Burton v. Hazzard*, 100.

Corporation books:—when evidence. *Jefferson v. Stewart*, 82.

A corporator is not a competent witness in an action between the company and a member. *Ibid.*

The verdict in one action of trespass is conclusive between the same parties only of the fact and date of the trespass and the possession. *Stean v. Anderson*, 209.

On a sale of real estate the sheriff must prove the posting of legal notices ten days before the sale. *Pyle's assignee v. Jeans*, 201.

A colored person is presumed to be free for the purpose of giving evidence. *State v. Jeans*, 570.

Possession is necessary to support trespass qu. cl. fregit. *Stean v. Anderson*, 209.

After ouster plaintiff cannot recover damages in trespass without a re-entry. *Ibid.*

Proof by a subscribing witness that he saw the party deliver an instrument already signed and sealed by him, is sufficient proof of execution. *Higgins v. Bogan*, 330.

EVIDENCE.

On the trial of an appeal from a justice of the peace, his record is not evidence; but if read without objection, it is no ground for a new trial. *Hudson v. Pettijohn*, 356.

An admission made in an affidavit out of the case is evidence against the affiant. *Hall v. Cannon*, 360.

The execution of a will by the testator's *mark*, is a sufficient *signing* within the statute of wills. *Smith et ux. v. Dolby*, 350.

In a case of undoubted capacity, it need not be proved that the will was read over to or by the testator. *Ibid.*

The formal execution of a will is a publication. *Ibid.*

A will can be revoked only by substitution, or by canceling, except in cases of implied revocation. *Ibid.*

A discharge on a petition for freedom, founded on the illegal exportation of petitioner by his master, is evidence of his freedom, on an indictment for kidnapping him. *State v. Harton*, 582.

The general reputation of a kidnapper is evidence of the intent with which defendant aided him in carrying off a free negro. *Ibid.*

Dying declarations; when admissible in evidence. *State v. Thawley*, 562.

The state of the deceased's health at the time of the injury is evidence. *Ibid.*

His character as a violent man is not evidence. *Ibid.*

Age of criminal liability: mischievous capacity. *State v. Bostick*, 563, 566.

Evidence of confessions—what influence will exclude them. *Ibid.*

The confession of a principal is not evidence against an accessory. *State v. Newport*, 567.

In bastardy cases the general character of the prosecutrix for *chastity* may be inquired into. *Short v. The State*, 568.

A question may be put to a witness tending to criminate him, but he is not obliged to answer. *Ibid.*

Public roads: evidence of dedication. *State v. Thomas*, 568.

In replevin, if the plaintiff count in the detinuit, he can recover damages for the detention only until replevin, though he should prove the property still in defendant's possession. *Truitt v. Revill*, 71.

The record of a private law takes effect from the date of placing it in the recorder's office. *Jefferson v. Stewart*, 82.

Arbitrators are not bound, though requested, to make the evidence a part of their award. *Allen v. Smith's administrator*, 234.

Where freedom of a colored person is necessarily averred, it must be proved, and is not presumed. *State v. Jeans*, 570.

EXECUTION.

After execution delivered to a constable, no alias can issue until it be regularly returned. *Bishop v. Spruance*, 114.

The presumption of law is, that a judgment is satisfied by execution issued, until the contrary appear by the officer's return to the execution. *Ibid.*

An execution binds from delivery. *Stuarts v. Reynolds*, 112.

The sheriff is bound to levy an execution on all the defendant's property without special orders. *Ibid.*

Payment to a sheriff when he has no writ in hand authorizing the levy of the money will not discharge the debt. *Lofland v. Jefferson*, 303.

EXECUTION.

The plaintiff is not answerable for irregular execution of process unless he commands it. *West v. Shockley et al.*, 287.

Execution process can be issued only to the sheriff in office, or his *immediate* predecessor. *Lofland v. Jefferson*, 303.

Real fixtures, such as steam engines, &c., placed on the premises of the owner, and attached to the freehold as a fixed establishment, are a part of the freehold, subject to real estate liens, and not liable to be seized as chattels. *Rice v. Adams et al.*, 332.

Not so of trade fixtures set up by tenants for their own use and convenience. *Ibid.*

Execution process is proved by the original, or a certified copy. *Truitt v. Revill*, 71.

If one constable deliver an execution in his hands to another for collection, the latter is not liable to plaintiff on his bond, but may be sued in assumpsit. *Pettijohn v. Hudson*, 178.

EXECUTOR AND ADMINISTRATOR.

One of several executors may submit to arbitration so as to bind the estate. *Lank v. Kinder et al.*, 457.

A stranger cannot object to the grant of administration to a party not having the legal preference. *Burton v. Burton's administrator*, 73.

Slight acts of intermeddling will make one an executor *de son tort*. *Wilson v. Hudson*, 168.

A sale of the goods of a decedent will make one an administrator *de son tort*; but will not change the title. *Ibid.*

An administrator is not bound to plead the act of limitation in all cases. *Chambers v. Vanneman's administrator*, 368.

An unqualified acknowledgment by an administrator of a subsisting debt, and of his liability to pay it, will prevent the bar of the act. *Ibid.*

So will a settlement under hand admitting a balance due. *Ibid.*

The administrator may be sued on such settlement, though the original cause of action may have been barred. *Ibid.*

An administrator cannot be charged as guardian of a distributee of the estate without some act transferring the liabilities from the administration to the guardian account. *Burton v. Tunnell et al.*, 424.

The passing a guardian account is sufficient. *Ibid.*

Quere. If the neglect to pass such account would not make the guardian liable on failure of the administration securities? *Ibid.*

Where the heir at law contests a will on reasonable grounds the costs fall on the estate. *Ross v. Hearn*, 101.

The proper costs for defending a will shall be allowed the executor. *Ibid.*

Costs on caveatting a will:—by whom paid. *Ibid.*

A legacy bequeathed to the defendant cannot be set off to an action by the executor, though he has assets to pay the legacy. *Robinson's executor v. Robinson*, 418.

FIXTURES.

Real fixtures, such as steam engines, &c., placed on the premises of the owner, and attached to the freehold, as a fixed establishment, are a part of the freehold,

FIXTURES.

subject to real estate liens, and not liable to be seized as chattels. *Rice v. Adams et al.*, 332.

Not so of trade fixtures set up by tenants for their own use and convenience. *Ibid.*

FRAUDS, STATUTE OF.

An agreement to accept a surrender of even a parol lease must be in writing. *Logan v. Barr*, 546.

A parol agreement fixing a dividing line of lands, and ascertaining its position on the ground, *with possession immediately following*, is conclusive on the parties, and is not within the statute. *Lindsay v. Springer*, 547.

A parol contract concerning lands being void, cannot be proved either for claim or defence. *Scatten v. Brown*, 324.

The sale or pledge of personal property without possession is void against creditors. *Bozman v. Herring*, 458.

FUGITIVE FROM JUSTICE.

A judge or justice of the peace has power to order the arrest of a fugitive from justice from another state before demand. *State v. Buzine*, 572.

A regular demand, under the act of Congress and warrant of the governor, to surrender a fugitive, is conclusive; and the court or judge cannot, on habeas corpus, inquire further into the offence charged. *Ibid.*

GUARDIANS. (See EXECUTORS AND ADMINISTRATORS.) p. 434.**HUSBAND AND WIFE.**

A married woman's covenant to convey land will not bind her, and cannot be pleaded as an estoppel. *Horsey v. Horsey*, 517.

A divorce restoring to the wife her lands, &c., divests judgment liens created by the husband, and annuls sales made under such liens. *Townsend v. Griffin*, 440.

A married woman's interest in land can be affected only by her private examination to a *deed*. *Horsey v. Horsey*, 517.

Her covenant to convey will not bind her. *Ibid.*

A court of law will not recognize a married woman's right to transact business and acquire property independent of her husband. *Johnson v. Johnson*, 171.

A woman may, by marriage contract, secure her property against her husband's debts; but after acquired property, though the proceeds of the property so secured, and of her own labors, belongs to her husband. *Weiser v. Boys et al.*, 249.

A husband is liable for his wife's contracts only where his consent is proved or implied. *Fredd v. Eves*, 385.

Whilst they live together his consent is presumed for necessaries furnished on his credit. *Ibid.*

Use endorsed on a judgment by husband and wife to the wife's assignee, struck off; though the bond was to husband and wife, and the survivor. *Shute et ux. v. Gould*, 203.

Bond to husband and wife and the survivor, vests in the husband entirely during coverture. *Ibid.*

Where the husband supplies necessaries, and gives notice he is not bound on such contracts. *Fredd v. Eves*, 385.

HUSBAND AND WIFE.

General notice by newspaper is not sufficient. *Ibid.*

Where husband and wife live separate by agreement, he is liable for necessaries, unless he provide a suitable maintenance and pays it punctually, or unless she has otherwise a sufficiency. *Ibid.*

If the husband desert his wife, or drives her away, or makes his house unfit for her to remain, he is liable. *Ibid.*

Not so if she elopes or goes away without lawful cause. *Ibid.*

A wife's interest in a recognizance in the Orphans' Court on acceptance of real estate may be attached for the debt of her husband. *Babb's executors v. Elliott*, 466.

A married woman cannot make a valid deed of her own land, so as to bind herself, without her husband. *Harris' lessee v. Burton*, 66.

Right of Husband to Control of his wife's property. 4440

INDORSER.

The indorser of a negotiable instrument may waive notice of its dishonor before maturity. *Bank v. Waples' executor*, 429.

The want of consideration for a negotiable instrument cannot be set up against an indorsee without notice. *Watermann v. Barratt*, 311.

If a bill or note be payable at a certain bank, and such bank is the holder, a formal demand is not necessary if there be no funds there. *Allen v. Miles*, 234.

Even if the bank be not the holder, a demand need not be averred or proved as against the maker or acceptor; though it must be proved to charge an indorser. *Ibid.*

INFANCY. (See **DEED**,) p. 75.**INNKEEPERS.** (See **TAVERNS**,) p. 132.**INQUISITION.**

Objection to inquisition on land made after the return term, on proof of want of notice. *Burton v. Wolfe*, 221.

Lands sold and conveyed need not be inquired on, though bound by the judgment, until after sale of other lands also bound. *Ibid.*

INSOLVENT.

The act of 1845, concerning non-resident insolvents, is constitutional. *Mercer's Case*, 248.

Construction of act of 1845, concerning non-resident insolvent prisoners. 541.

An insolvent, discharged on a judge's order for want of indemnity to the county, cannot be again imprisoned in the same case. *Smith's Case*, 554.

The courts of this state recognize insolvent discharges in Maryland, which do not affect the contract. *Lewis v. Norwood*, 460.

A deed of manumission executed by an insolvent to defraud creditors, is void. *Dulany v. Green*, 285.

The deed of a drunken man is void. *Ibid.*

INTEREST.

Interest is calculated from the expiration of the credit where that is agreed on; otherwise by the usage. *Bate v. Burr*, 130.

Interest may be recovered on arrears of an annuity given in lieu of dower, though there be a power of distress. *Houston v. Jamison's administrator*, 330.

JOINT TENANTS. (See *WILLS*,) p. 68.

JUDGMENT.

A judgment is conclusive, and not questionable in any other proceeding, though a mistake could be shown arising even from the default of the plaintiff in such judgment. *Solomon v. Loper et al.*, 187.

The court will not allow the amount of a judgment confessed, "amount to be ascertained," to be summarily ascertained after considerable lapse of time. *Clark's assignee v. Cooper*, 189.

Judgment by default in an action on a bond with a collateral condition, admits a cause of action, and the execution of the bond need not be proved on an inquiry of the damages. *Macklin v. Ruth*, 87.

Judgment on an award against an administrator is a judgment of assets, and does not bind the defendant personally unless assets be found, though there be no plea of plene administravit. *Crossan's adm'z. v. Glass*, 342.

By assignment in the Orphans' Court all liens created by an heir at law are removed. *State use, &c. v. Huxley*, 343.

The heir's interest is changed into personalty. *Ibid.*

Quare. Whether the heir's interest in the recognizance may not be attached? *Ibid.*

The judgments of courts of other states are conclusive in all the states if the jurisdiction appear by the record. *Pritchett v. Clark*, 280.

Judgment in partition is conclusive on parties and privies. *Sean v. Anderson*, 209.

A release by a judgment creditor, at the instance of the debtor, of one of several tracts of land bound by the judgment, will not operate as a release of the other tracts. *Wolfe v. Gardner et al.*, 338.

A letter of attorney to confess judgment is revoked by death. *Lynch v. Tunnell*, 284.

A divorce, restoring to the wife her lands, &c., divests judgment liens created by the husband; and annuls sales made under such liens. *Townsend v. Griffin*, 440.

JUSTICE OF THE PEACE.

Justices of the peace may take affidavits to be used as the foundation of motions in court. *Shule et ux. v. Gould*, 203.

A judge or justice of the peace has power to order the arrest of a fugitive from justice from another state before demand. *State v. Buzine*, 572.

A regular demand, under the act of Congress and warrant of the governor, to surrender a fugitive, is conclusive; and the court or judge cannot, on habeas corpus, inquire further into the offence charged. *Ibid.*

Power of magistrate to settle cases of assault and battery. *State v. Mouseley*, 553.

On a judgment by *default* the justice's record must show that he heard the plaintiff's proofs. *Ellegood v. Cannon*, 176.

In a suit commenced by *summons*, it will be presumed that defendant is a *freeholder*. *Ibid.*

The judgment against a garnishee, whose answer admits a specific chattel, must be, that he deliver the chattel, and not for a sum of money. *Maybin v. Williamson et al.*, 434.

Judgment cannot be entered on a judgment note after the death of the maker. *Lynch v. Tunnell*, 284.

JUDGMENT.

Judgment by *default* cannot be signed until the usual time of closing business, unless the hearing was fixed for a certain hour. *Colescott v. Bonwill*, 364.

A justice of the peace may adjourn a cause a *second* time without the application of either party; but the record should state the cause of adjournment. *Mousely v. Allmond*, 92. *Deputy v. Betts*, 352.

The oath against defendant's freehold must be made within two days after judgment, to deprive him of a stay of execution. *Ibid.*

The statement filed before a justice of the peace in an action of trespass is not evidence on appeal. *Townsend v. Steward*, 94.

LANDLORD AND TENANT.

A person who enters as a purchaser cannot be treated as a tenant, without contract. *Redden v. Barker*, 179.

A landlord cannot maintain trespass to land occupied by his tenant. *Tilghman v. Cruson*, 341.

A landlord attaching his tenant's *goods* on affidavit of his intention to remove them from the *county*, is not bound to support his affidavit by proof of reasonable ground at the *next* term of the court. *Wright v. Hobson*, 382.

The proceeding by attachment against the *goods* of a tenant differs in this respect from proceedings under sec. 20, founded on an affidavit of the *tenant's* intention to leave the state. *Ibid.*

Real fixtures, such as steam engines, &c., placed on the premises of the owner, and attached to the freehold as a fixed establishment, are a part of the freehold, subject to real estate liens, and not liable to be seized as chattels. *Rice v. Adams et al.*, 332.

Not so of trade fixtures set up by tenants for their own use and convenience. *Ibid.*

Ejectment will not lie against a person coming in as a tenant, without notice to quit. *Horsey v. Horsey*, 517.

One coming in as tenant to a tenant for life, does not, upon his death, become the tenant of the remainder man, without his assent, express or implied. *Ibid.*

Use and occupation will lie only by a landlord against a tenant. *Redden v. Barker*, 179.

Requisites of affidavit by landlord against tenant, to procure an attachment under Dig. 365. *Yarnall v. Haddaway*, 437.

LEGACY.

A legacy bequeathed to the defendant cannot be set off to an action by the executor, though he has assets to pay the legacy. *Robinson's ex'r v. Robinson*, 418.

A legacy is not within the act of limitation. *Parkins v. Cartwell*, 270.

A devise of land to executors to sell for payment of debts, is a conversion of it "out and out," applicable to pecuniary legacies. *Sharpley v. Townsend*, 336.

LIMITATION.

A. by will divided his personal estate among children, and directed the shares to be paid "when they arrived to the age of maturity." His administrator c. t. a. gave bond more than six years before the youngest child came of age. An act of limitation was passed barring suits on such bonds in six years from date, saving infancy or coverture at the *accrual of the cause of action*; the action of the legatee

LIMITATION.

brought on the bond within three years after full age, is not barred. *Layton v. The State*, 8.

A judgment is presumed to have been paid after twenty years, without demand or recognition, if nothing be shown to the contrary. *Bank v. Leonard*, 536.

The defendant's poverty and insolvency is evidence to rebut the presumption. *Ibid.*

An "acknowledgment under the hand of the party" excepted, out of the act of limitation, is such as in itself furnishes a cause of action. *Boston v. Bradley*, 524.

If one contract in writing to deliver goods at market, and pay over half the proceeds, the cause of action arises from the sale of the goods, and not from the writing, and is barred in three years. *Ibid.*

Limitation does not begin to run on a note payable on or after sight, until demand. *Wolfe v. Whiteman*, 246.

An act of limitation barring remedies before the accruing of the cause of action, is unconstitutional. *Layton v. State*, 8.

Certiorari issued five years after judgment, dismissed. *West v. Shockley*, 108.

An administrator is not bound to plead the act of limitation in all cases. *Chambers v. Fennemon's administrator*, 368.

An unqualified acknowledgment by an administrator of a subsisting debt, and of his liability to pay it, will prevent the bar of the act. *Ibid.*

So will a settlement under hand admitting a balance due. *Ibid.*

The administrator may be sued on such settlement, though the original cause of action may have been barred. *Ibid.*

Thirty years' possession will not give title as against the state. *Wall's lessee v. M'Gee et al.*, 108.

A patent from the state presumed on proof of a warrant 103 years old, located 67 years, with 88 years' possession. *Ibid.*

The principle of acts of limitation is adopted in equity. *Perkins v. Cartwell*, 270.

A Court of Equity refuses aid to a stale demand independent of limitation. *Ibid.*

A legacy is not within the act of limitation. *Ibid.*

A claim against a sheriff for not satisfying prior liens out of the proceeds of land sold by him, is excepted out of the act of limitation, as "founded on a record;" though the suit be not technically on the record. *Bank v. Gardner's administrator*, 430.

To a declaration in assumpsit on common counts, an acknowledgment under hand should be replied, to a plea of non assumpsit infra tres annos, to get the benefit of the six years limitation. *M'Dermott v. McCormick*, 543.

A trust is not barred by limitation; but trusts repudiated for great length of time will be defeated. *Perkins v. Cartwell*, 270.

LOTTERY.

Lottery tickets are proper subjects of book charge. *Gregory & Co. v. Bailey*, 256.

The wholesale vendors of lottery tickets under grant from the state are not bound to take out license. *Ibid.*

In assumpsit plaintiff may recover on the account stated count, on proof of an admission of balance, without proof of items. *Ibid.*

The prohibition to sell lottery tickets without license does not invalidate the sale, but subjects the party to a penalty. *Ibid.*

MILLS. (See PRACTICE,) p. 197.

MISTAKE.

Money paid through ignorance or mistake of a fact may be recovered back, but not when the party had means of knowledge. *West v. Houston*, 170.

NEGLIGENCE.

Vessels are bound to provide proper pilots, lookouts, lights, &c., and are responsible for accidents resulting from want of them. *Steamboat Co. v. Whilldin*, 228.

Exemplary damages may be given for a wilful collision of vessels. *Steamboat Co. v. Whilldin*, 228.

For mere negligence, or ignorance, the damages in case of collision are merely compensatory. *Ibid. Cummins v. Spruance*, 315.

Nothing can be recovered for collision of vessels arising from mere accident. *Ibid. Cummins v. Spruance*, 315.

The Wilmington Railroad Company is liable for injuries resulting from the negligence of its agents. *Burton v. R. R. Co.*, 252.

They are not liable for accidents caused by the noise of letting off steam, &c. *Ibid.*

Negligence is a question of fact for the jury. *Ibid.*

Trespass on the case is the proper form of action for collisions of vessels from negligence. *Steamboat Co. v. Whilldin*, 228.

NEGROES. (See EVIDENCE,) p. 439.

PARTNERSHIP.

A partner cannot bind the firm by deed. *Morris v. Jones et al.*, 428.

The single bill of one partner binds himself alone. *Ibid.*

It merges the partnership debt. *Ibid.*

"Partnership" is a question of law. It may be inferred from circumstances. *Gilpin v. Temple et al.*, 190.

Common reputation is evidence of partnership, if shown to be founded on the acts of the party to be charged. *Ibid.*

The acts, &c., of one person are not evidence to prove partnership to charge another. *Ibid.*

PLEADING.

Suit before a justice of the peace against two; appearance by one only, and judgment against him; he may be declared against alone on appeal. *Jackson v. Hedges*, 96.

Judgment against an infant and others jointly, on a joint and several bond, irregular. *Carnahan v. Allerdice et al.*, 99.

To a declaration in assumpsit on common counts, an acknowledgment under hand should be replied to a plea of non assumpsit infra tres annos to get the benefit of the six years' limitation. *McDermott v. McCormick*, 543.

Will replevin lie where the taking was lawful? *Johnson v. Johnson*, 171.

Replevin will lie only in case of an unlawful detention. *Ibid.* Or tortious taking. *Drummond v. Hopper*, 327.

A purchaser of goods at sheriff's sale must demand them before he can maintain replevin. *Johnson v. Johnson*, 171.

Effect of an unexplained alteration in an instrument declared on, as to the question of variance. *Curry et al. v. May*, 173.

PLEADING.

A party having leave to amend his pleadings on terms, cannot plead until the terms are complied with. *Smith v. Johnson*, 541.

The reversioner may sue tenant in dower for injuries to the inheritance, though there be another intermediate life estate. *Short v. Piper et al.*, 181.

In a scire facias on a judgment in the Court of Common Pleas, entered on a transcript from a justice's judgment, the defendant cannot object to the regularity of the justice's judgment, nor go behind the judgment of the court. *Hill's administrator v. Brown*, 519.

Property of a minor; how laid in indictments. *State v. Koch*, 570.

The non-joinder of proper defendants must be pleaded in abatement. *Andrews v. Allen*, 452.

A claim against a sheriff for not satisfying prior liens out of the proceeds of land sold by him, is excepted out of the act of limitation, as "founded on a record;" though the suit be not technically on the record. *Bank v. Gardner's administrators*, 430.

Assumpsit will lie against a constable for money had and received, though he be liable on his bond, and also under the act of 1833. *Pettijohn v. Hudson*, 468.

The failure or want of consideration cannot be pleaded against a specialty. *Stayton v. Morris*, 357.

Fraud in obtaining it may; but not fraud in reference to the consideration. *Ibid.*

How to declare on a note signed by a wrong name. *Prettyman v. Waples' executor*, 299.

An executor cannot be charged as such for money had and received to plaintiff's use. *Bank v. Cullen*, 289.

A count for money had and received cannot be joined with a count on an account stated with an executor. *Ibid.*

Judgment will not be arrested after verdict for any pleading not defective on general demurrer; nor then if it can be presumed the proof supplied the defect. *Higgins v. Bogan*, 331.

An instrument must be pleaded according to its legal effect. *Ibid.*

A promissory note under seal is a bill obligatory. *Ibid.*

Consent cannot give jurisdiction, but may waive irregularity of process. *Lewis v. Hazel*, 470.

The transcript on appeal from a justice of the peace, though required to be under seal, is not essential to jurisdiction, and the seal may be waived by pleading over. *Ibid.*

If advantage be not taken of irregularity at the earliest time, it is a waiver. *Ibid.*

Where the plaintiff counts generally and specially, and fails to prove the special contract, he may recover on the common counts; but if he prove a different special contract, he cannot recover on any of the counts. *Morris v. Burton*, 53. *Draper v. Randolph & Co.*, 454.

One trespasser cannot maintain trespass against another. *Tubbs v. Lynch*, 521.

Occupants of vacant land, in mixed possession, before 1843, become tenants in common under the act of assembly. *Ibid.*

Where freedom of a colored person is necessarily averred it must be proved, and is not presumed. *State v. Jeans*, 570.

How to take advantage of the act of limitation in case of judgment confessed on a public bond barred at the time of confessing judgment. *Parker's use v. Whitaker*, 527.

Requisites of affidavit by landlord against tenant, to procure attachment under Dig. 365. *Yarnall v. Haddaway*, 437.

PLEADING.

Additio probat minoritatem: A. B. means the *elder* of that name. 130.

The short entry of "limitation" in pleading means six or three years, according to the demand. *Boston v. Bradley*, 524.

Property in several; larceny of—how laid. *State v. Frame*, 569.

A partner cannot bind the firm by deed. *Morris v. Jones et al.*, 428.

The single bill of one partner binds himself alone. *Ibid.*

It merges the partnership debt. *Ibid.*

A tenant holding under a written lease continues (without notice to quit) to hold *under its terms*: and if the demise be stated in the avowry, he cannot, under plea of non dimisit, prove a different contract by parol. *Jackson v. Patterson et al.*, 534.

If the demise be laid generally he may prove any terms by parol, though the original letting was by deed. *Ibid.*

If the condition of a statutory bond be contrary to the statute, it is *void*. *Hazzard v. Layton*, 512.

If part be in pursuance of the statute, and part otherwise, it will not avoid the bond altogether, unless the statute so enacts. *Ibid.*

If one constable deliver an execution in his hands to another for collection, the latter is not liable to plaintiff on his bond, but may be sued in *assumpsit*. *Pettijohn v. Hudson*, 178.

In an action against a constable for neglecting to execute process, he cannot plead the defectiveness of his writ, unless it be for want of jurisdiction. *Coverdale v. Fowler*, 358.

Covenants, mutual and independent: conditional: concurrent:—construction of. *Houston v. Spruance*, 117.

Where mutual covenants go to the whole consideration they are conditions. *Ibid.*

Where a day is fixed for payment for a thing to be done, if such day is beyond the time the act is to be done, it is a condition precedent, and the obligation of payment is conditional. *Ibid.*

H., a mail contractor, under a schedule to commence from 1 Jan. 1840, sold it to G. for \$1600, payable in cash on or before the 1st Jan., the contract to be assigned, &c.: *held*, that plaintiff could not recover the \$1600 without showing an assignment, or readiness to assign. *Ibid.*

A married woman's covenant to convey land will not bind her, and cannot be pleaded as an estoppel. *Horsey v. Horsey*, 517.

On replevin, bond should be taken in an amount sufficient to secure the return of the goods attached, or an equivalent value. *Plunkett v. Moore*, 379.

PRACTICE.

In the execution of a commission to take depositions, the commissioner need not sign each deposition if he authenticate the whole. *Boston v. Bradley*, 524.

A commission *de bene esse* to take the testimony of a going witness may be executed out of the state. *Ibid.*

In *case* for deceit, a count in *trover* may be added. *Tyre v. Causey*, 425.

The remedy on a false warranty is in *assumpsit* or *case*. *Ibid.*

A sheriff's return of "levied on lands as per inquisition annexed, subject," &c., does not satisfy the judgment, though it might make the sheriff liable. *Bank v. Leonard*, 536.

Mode of certifying depositions, and referring to papers proved therein. *Hatfield v. Perry*, 463.

PRACTICE.

Verdict set aside for error in calculating interest. *Prettyman v. Waples' executor*, 299.

Public roads: effect of return and confirmation, as to the question of damages. *Wilson v. Levy Court*, 88.

In actions ex contractu judgment goes at the second term, unless there is an affidavit of defence. 452.

Notice of holding inquisition on land, or of sale, must be served personally on defendant, if residing in the county; if not, on the tenant, or left at the mansion-house. 452.

A purchaser of goods at sheriff's sale may maintain replevin for them after demand and refusal. *Hazzard v. Burton*, 62.

It is not legal for a sheriff to sell goods not present; but the purchaser of goods so sold is entitled to them, unless the sale be set aside. *Ibid.*

Sale of land set aside for want of notice of *inquisition*. *Collins v. Steel*, 536.

The defendant on appeal from a justice of the peace may recover a sum beyond the magistrate's jurisdiction. *Prettyman v. Waples' executor*, 299.

Replevin will not lie by the owner of property against the purchaser from a bailee, though he had no authority to sell. *Drummond v. Hopper*, 327.

A taking under color of a contract with a drunken bailee may be regarded as a *tortious* taking. *Ibid.*

In a case standing referred, new parties cannot be made, by suggestion of death and motion merely, several terms having elapsed. *Rowland v. Bennett's administrator*, 329.

Money paid on an unexecuted contract may be recovered back without a tender of the balance, if the contract is rescinded. *Burton v. Wharton*, 296.

Appeals from the Register on settlement of administration accounts are to the Orphans' Court, and not to the Superior Court. *Smith's estate*, 244.

The act of 1773, for the encouragement of mill owners, does not apply to dams already located. *Garrett et al. v. Bailey*, 197.

A probate need not be produced unless called for. *Prettyman v. Waples' executor*, 299.

Every contract to do work implies that it is to be done skillfully, and that the contractor is competent. *Hall v. Cannon*, 360.

A party is not bound to accept work not done according to contract; but if he derives any benefit, the contractor may recover for it. *Hall v. Cannon*, 360. *Draper v. Randolph & Co.*, 454.

If a price was stipulated, the plaintiff recovers a proportion subject to deduction for defectiveness; if not, on the quantum meruit. *Ibid.*

Verdict set aside for the introduction of intoxicating liquor into the jury room. *Gregg's lessee v. M'Daniel*, 367.

A party may recover for a partial performance of a contract closed by the defendant's refusal to permit full performance. *Draper v. Randolph & Co.*, 454.

The plaintiff on an appeal cannot take a non pros at pleasure. *Prettyman v. Waples' executor*, 299.

In ejectment the defendant must specify the premises he demands for, and confess the possession as well as lease, entry and ouster. 453.

The court will not set aside a verdict found on conflicting evidence, though they would have found otherwise. *Burton v. R. R. Co.*, 252.

PRACTICE.

Witnesses' fees taxed at the term after trial. *Steam v. Anderson*, 209.

Probate of an account must be made by all the acting partners of a firm. *Gregory & Co. v. Bailey's administrator*, 256.

Dormant or absent partners need not join in making a probate. *Ibid.*

In assumpit plaintiff may recover on the account stated count, on proof of an admission of balance, without proof of items. *Ibid.*

The prohibition to sell lottery tickets without license does not invalidate the sale, but subjects the party to a penalty. *Ibid.*

If the declaration on an appeal do not correspond with the statement below, it must be objected to before pleading to issue. *Townsend v. Steward*, 94.

The transcript must show the jurisdiction below, and the right of appeal. The want of this may be objected at any time. *Ibid.*

Re-trial had in a criminal case at the same term; the first jury having been discharged by the court. *State v. Updike*, 581.

Change of venue; when allowed. *State v. Burris*, 582.

Notice of inquisition or sale of lands must be served personally on defendant, if within the county; if he resides out of the county, notice is to be served on the tenant, or left at the mansion house. *Wolf v. Heathers*, 325.

An attorney in fact not allowed to prosecute a suit after revocation of his authority, though he had accepted orders payable out of the suit, and had incurred costs. *Gibbons v. Gibbons*, 105.

Goods taken on domestic attachment are in legal custody for the benefit of all the creditors. *Phunkett v. Moore*, 379.

A debt due by judgment and execution levied, is subject to the process of foreign attachment; and the court will stay the execution until appearance. *Belcher v. Grubb*, 461.

The discretion exercised by justices of the peace, or trustees of the poor, in binding out poor children, may be reviewed by the court or a judge. *Moody v. Benson*, 115.

Appeals from the Register in probate cases are tried by the court and not by jury. *Barker et ux. v. Spicer*, 348.

The Superior Court may direct an issue on an appeal from the Register in probate cases. *Ibid.*

Judgment confessed severally on a joint bond cannot be amended by adding the co-obligor's name. *Pusey's executor v. Smith*, 204.

Plaintiff may avow generally in replevin for rent, and adapt his proof to the avowry. *King's administrator v. Lambden et al.*, 283.

Notice of justification of bail must be given to the plaintiff or his attorney, 452.

If a bill or note be payable at a certain bank, and such bank is the holder, a formal demand is not necessary if there be no funds there. *Allen v. Miles*, 234.

Even if the bank be not the holder, a demand need not be averred or proved as against the maker or acceptor; though it must be proved to charge an endorser. *Ibid.*

A certificated bankrupt cannot be held to bail on a promise to pay a debt due before bankruptcy. *Glazier v. Stafford*, 240.

On certiorari to a justice's judgment on confession, the fact of confession cannot be denied against the record. *Rumyan v. Dickenson*, 243.

If one constable deliver an execution in his hands to another for collection, the

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latter is not liable to plaintiff on his bond, but may be sued in assumpsit. *Pettijohn v. Hudson*, 178.

A purchaser at a collector's sale for taxes is not bound to see to the regularity of the proceedings. *Tilghman v. Cruson*, 341.

If the sale be authorized, its regularity cannot be collaterally questioned. *Ibid.*

A constable cannot be charged under the act of 1833 for neglect of duty, without showing process regularly in his hands. *Rash v. Parris*, 81.

A *ca. sa.* cannot issue against a white inhabitant of the state without the evidence of his inability to pay required by the act of 1785; and also the affidavit of fraud required by the act of 1841. *Johnson v. Temple, Jr.*, 446.

The rule to file exceptions, or allege diminution in certiorari cases by the first Friday of the term does not extend to a defendant. *Prickett v. Herring*, 323.

Quere. Will not the court order up the original record on certiorari if it be alleged that the transcript is false? *Prickett v. Herring*, 365.

Has not the court power to punish for an improper alteration of the record? *Ibid.*

The judgment entry aided by the margin. *Clothier v. Clark*, 365.

The court will not tax the costs of witnesses summoned to support others not examined. *Brittingham v. Collins et al.*, 298.

In an action against a constable for neglecting to execute process, he cannot plead the defectiveness of his writ, unless it be for want of jurisdiction. *Coverdale v. Fowler*, 358.

The costs of witnesses summoned without due caution, will be disallowed. *West v. Shockley et al.*, 287.

The treasurer of a ditch company, under the general ditch law, cannot be sued, on the managers' orders, without acceptance. *Watson v. Loftland*, 60.

Such orders must be drawn by both managers. *Ibid.*

The managers are liable to laborers; not the treasurer. *Ibid.*

The acknowledgment of a deed before a notary public must be within the state. *Harris' lessee v. Burton*, 66.

A suit of dower abates by the death of defendant, and cannot be prosecuted even for damages for detention. *Betts v. Matthews*, 427.

Objections to road and ditch returns must be made in writing, and be supported by affidavit, unless the facts appear by the record. 452.

Relief in equity cannot be decreed as on a case not stated by the bill. *Jones v. Bush et al.*, 1.

An administrator cannot be charged as guardian of a distributee of the estate, without some act transferring the liabilities from the administration to the guardian account. *Burton v. Tunnell et al.*, 424.

The passing a guardian account is sufficient. *Ibid.*

Quere. If the neglect to pass such account would not make the guardian liable on failure of the administration securities? *Ibid.*

A writ of error will not lie to a decision granting or refusing a nonsuit. *May v. Curry et al.*, 265.

A party justifying under execution process must show the judgment, execution, and levy. *Truitt v. Revill*, 71.

In replevin, if the plaintiff sues in the detinuit he can recover damages for the detention only until replevin, though he should prove the property still in defendant's possession. *Ibid.*

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On the trial of an appeal from a justice of the peace, his record is not evidence; but if read without objection, it is no ground for a new trial. *Hudson v. Pettijohn*, 356.

The verdict in one action of trespass is conclusive between the same parties only of the fact and date of the trespass and the possession. *Steane v. Anderson*, 209.

Assumption for use and occupation will not lie against a person who entered into possession as a purchaser, though the contract of purchase be rescinded, and the premises recovered back in ejectment. *Mariner v. Burton's administrator*, 69.

The books of a party being evidence, with his oath, of sale and delivery of goods, he may be cross-examined on this point. *Fredd v. Eves*, 38.

A witness whose deposition has been read may be called to testify to matters not embraced in his deposition. *Halford v. Perry*, 463.

Execution process can be issued only to the sheriff in office, or his immediate predecessor. *Lofland v. Jefferson*, 303.

A patent from the state presumed on proof of a warrant 103 years old, located 67 years, with 88 years' possession. *Wall's lessee v. M'Gee et al.*, 108.

A stranger cannot object to the grant of administration to a party not having the legal preference. *Burton v. Burton's administrator*, 73.

After execution delivered to a constable, no alias can issue until it be regularly returned. *Bishop v. Spruance*, 114.

The presumption of law is, that a judgment is satisfied by execution issued, until the contrary appear by the officer's return to the execution. *Ibid.*

Possession is necessary to support trespass qu. cl. fregit. *Steane v. Anderson*, 209.

After ouster, plaintiff cannot recover damages in trespass without a re-entry. *Ibid.*

A parol contract concerning land being void, cannot be proved either for claim or defence. *Scotter v. Brown*, 324.

Use endorsed on a judgment by husband and wife to the wife's assignor, struck off; though the bond was to husband and wife, and the survivor. *Shute et ux. v. Gould*, 203.

Bond to husband and wife and the survivor vests in the husband entirely during coverture. *Ibid.*

Objection to inquisition on land made after the return term, on proof of want of notice. *Burton v. Wolfe*, 221.

Lands sold and conveyed need not be inquired on, though bound by the judgment, until after sale of other lands also bound. *Ibid.*

A party having leave to amend his pleadings on terms, cannot plead until the terms are complied with. *Smith v. Johnson*, 541.

Suit before a justice of the peace against two; appearance by one only, and judgment against him; he may be declared against alone on appeal. *Jackson v. Hedges*, 96.

Judgment against an infant and others jointly, on a joint and several bond, irregular. *Carnahan v. Allardice et al.*, 99.

After judgment in attachment, and auditors appointed, payment of the attaching creditor will not arrest the proceeding. *Stone v. Jones*, 255.

The action of waste can be only by the immediate reversioner. *Short v. Piper et al.*, 181.

Where the plaintiff counts generally and specially, and fails to prove the special

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contract, he may recover on the common counts; but if he prove a different special contract, he cannot recover on any of the counts. *Morris v. Burton*, 53. *Draper v. Randolph & Co.*, 454.

Use and occupation will lie only by a landlord against a tenant. *Redden v. Barker*, 179.

Mode of authenticating records under the acts of Congress. 435.

Trespass on the case is the proper form of action for collisions of vessels from negligence. *Steamboat Co. v. Whilldin*, 228.

A writ of error does not lie to the Court of General Sessions of the Peace. *Rowlan d v. Hickman*, 478.

Judgment on an award against an administrator is a judgment of assets, and does not bind the defendant personally, unless assets be found, though there be no plea of plene administravit. *Crossan's adm'x v. Glass*, 342.

Judgment by default in an action on a bond, with a collateral condition, admits a cause of action; and the execution of the bond need not be proved on an inquiry of the damages. *Macklin v. Ruth*, 87.

A judgment is conclusive, and not questionable in any other proceeding, though a mistake could be shown, arising even from the default of the plaintiff in such judgment. *Solomon v. Loper et al.*, 187.

The court will not allow the amount of a judgment confessed, "amount to be ascertained," to be summarily ascertained after considerable lapse of time. *Clark's assignee v. Cooper*, 189.

In actions ex contractu, judgment shall be rendered at the second term, unless there is an affidavit of defence. 209.

The judgments of courts of other states are conclusive in all the states if the jurisdiction appear by the record. *Pritchett v. Clark*, 280.

The court will not review the judgment of arbitrators on the facts, but will correct a clear mistake of law or fact. *Allen v. Smith's administrator*, 234.

Justices of the peace may take affidavits to be used as the foundation of motions in court. *Shadet ux. v. Gould*, 203.

Judgment in partition is conclusive on parties and privies. *Ste an v. Anderson*, 209.

PRESUMPTIONS.

A grant from the state may be presumed on a possession of 60 years. *Tubbs v. Lynch*, 521.

Presumptions as to freedom. *State v. Jeans*, 670.

In a suit for dower, plaintiff recovered against a purchaser on a judgment entered the same day of the marriage, there being no proof which occurred first. *Ingram v. Morris*, 111.

A patent from the state presumed on proof of a warrant 103 years old, located 67 years, with 88 years' possession. *Walls' lessee v. Magee et al.*, 108.

After execution delivered to a constable, no alias can issue until it be regularly returned. *Bishop v. Spruance*, 114.

The presumption of law is that a judgment is satisfied by execution issued, until the contrary appear by the officer's return to the execution. *Ibid.*

PRINCIPAL AND AGENT.

The Wilmington Railroad Company is liable for injuries resulting from the negligence of its agents. *Burton v. R. R. Co.*, 252.

PRINCIPAL AND AGENT.

They are not liable for accidents caused by the noise of letting off steam, &c.
Ibid.

Negligence is a question of fact for the jury. *Ibid.*

An agent is liable on his contract, though his principal be known. *Andrews v. Allen*, 452.

If one sell goods to an agent, knowing the principal, and give credit to the agent, he cannot charge the principal. *Bate v. Burr*, 130.

PROBATE.

A will destroyed by the heir at law admitted to probate on proof of its contents by one witness, and rough draft: the proof of execution being full. *Kearns v. Black*, 83.

Dormant or absent partners need not join in making a probate. *Gregory v. Bailey's administrator*, 256.

A probate need not be produced unless called for. 299.

Probate of an account must be made by all the acting partners of a firm. *Gregory & Co. v. Bailey*, 256.

PROTEST. (See *BILLS*, &c.)RENT. (See *USE AND OCCUPATION*.) p. 224.

REPLEVIN.

Plaintiff may avow generally in replevin for rent, and adapt his proof to the avowry. *King's administrator v. Lambden et al.*, 283.

On replevin, bond should be taken in an amount sufficient to secure the return of the goods attached, or an equivalent value. *Plunkett v. Moore*, 379.

In replevin, if the plaintiff count in the detinuit, he can recover damages for the detention only until replevin, though he should prove the property still in defendant's possession. *Trwitt v. Revill*, 71.

Replevin will not lie by the owner of property against the purchaser from a bailee, though he had no authority to sell. *Drummond v. Hopper*, 327.

A taking, under color of a contract, with a drunken bailee, may be regarded as a tortious taking. *Ibid.*

In a case standing referred, new parties cannot be made, by suggestion of death and motion merely, several terms having elapsed. *Rowland v. Bennett's administrator*, 329.

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A purchaser of goods at sheriff's sale must demand them before he can maintain replevin. *Johnson v. Johnson*, 171.

RIVERS.

The law of the river. *Steamboat Co. v. Whilldin*, 228.

Duck Creek, in Kent County, is a common highway for all vessels capable of navigating it. *Cummins v. Spruance*, 315.

RIVERS.

The state has the right of a proprietor over navigable streams entirely within its borders; and may obstruct, or (unless where restricted by the Constitution of the United States) may close up such streams at pleasure. *Bailey v. R. R. Co.*, 389.

Such rivers are public highways, and open to all for navigation and fishery; but the legislature may impair or take away these rights for public purposes. *Ibid.*

Riparian proprietors have no individual rights to a river, and are entitled to no compensation for the loss of those easements which they hold in common with other citizens. *Ibid.*

An obstruction of a river, authorized by the legislature, gives no right of action. *Ibid.*

An unauthorized obstruction is a public offence, and no ground of private suit. *Ibid.*

The act of Assembly of 1837, authorizing the erection of a close bridge over White Clay Creek, is constitutional; and gives no right of action to mill owners above for obstruction of the water. *Ibid.*

Such bridge must be made, and kept up, in conformity with the law; any additional obstruction, attended with special damage, is actionable. *Ibid.*

An act giving a right of action for *authorized* obstructions passed after they were made, and not accepted by the Railroad Company, is a violation of their charter, and of the obligations of the contract with them; and, therefore, unconstitutional. *Ibid.*

An act giving a remedy by summary action for *unauthorized* obstructions is constitutional, though passed after the injury sustained. *Ibid.*

The assessment of damages by a jury of inquest, returnable to court, is a constitutional mode of trial in such cases. *Ibid.*

The Supreme Courts of a state are obliged to decide on the constitutionality of laws; and, in cases of plain and apparent opposition, to pronounce them void. *Ibid.*

ROADS.

What is the law of trespasses by cattle running at large on the public road? *Haines v. Wise*, 243.

Road and ditch returns, (see *Rules of Court*.) 452.

Objections to road and ditch returns must be made in writing, and be supported by affidavit, unless the facts appear by the record. 452.

Public roads: effect of return and confirmation as to the question of damages. *Wilson v. Levy Court*, 88.

RULES OF COURT.

Rules of Court. 452.

General rule as to notice of inquisition or sale of land. 325.

SHERIFF.

The sheriff is entitled to a levying fee against each of several defendants in an execution. *Robinson v. Burton et al.*, 457.

He is not entitled to an advertising fee, though the advertisement be omitted at defendant's request. *Ibid.*

A sheriff has no power to execute process after the return day. *Lofland v. Jefferson*, 303.

SHERIFF.

A sheriff is not entitled to "dollarage" for money not made by him; unless it is paid before the return day of the writ, or whilst he had process in hand authorizing him to levy it. *Lofland v. Jefferson*, 303.

On a sale of real estate the sheriff must prove the posting of legal notices ten days before the sale. *Pyle's assignee v. Jeans*, 201.

Payment to a sheriff when he has no writ in hand authorizing the levy of the money will not discharge the debt. *Lofland v. Jefferson*, 303.

An execution binds from delivery. *Stuarts v. Reynolds*, 112.

The sheriff is bound to levy an execution on all the defendant's property without special orders. *Ibid.*

It is not legal for a sheriff to sell goods not present; but the purchaser of goods so sold is entitled to them, unless the sale be set aside. *Hazzard v. Burton*, 62.

A sheriff's return of "levied on lands as per inquisition annexed, subject," &c., does not satisfy the judgment, though it might make the sheriff liable. *Bank v. Leonard*, 536.

Notice of inquisition or sale of lands must be served personally on defendant, if within the county; if he reside out of the county, notice is to be served on the tenant, or left at the mansion house. *Wolf v. Heathers*, 325.

SLANDER.

In the action of slander the defendant's circumstances as to property cannot be given in evidence. *Morris v. Barker*, 520.

Under the general issue the defendant may prove previous reports of plaintiff's guilt, to reduce the damages and disprove malice. *Ibid.*

Malice is implied from charges of an indictable offence. *Ibid.*

A charge that plaintiff was about to run away and defraud creditors is actionable, with special damage. *Prettyman v. Shockley*, 112.

Judicial investigations are privileged, and not the subject of an action for slander. *Eccles v. Shannon*, 193.

SLAVES.

Stage proprietors are liable for knowingly taking a slave as a passenger. *Redden v. Spruance et al.*, 217.

Carriers are bound to inquire with due diligence into the condition of colored passengers. *Ibid.*

Suspicious circumstances, notice, &c., require the utmost diligence. *Ibid.*

SUNDAY. (See TAVERNS.) p. 132.**TAVERNS.**

Bowling alleys attached to taverns; when unlawful. *State v. Records*, 554.

The sale of liquor by an innholder on Sunday not within the act against profaning the Lord's day; he being obliged to keep a public house of entertainment. *Hall v. State*, 132.

TRESPASS.

Trespass quare clausum fregit may be maintained against a wrong doer by a person having a naked possession, without title; but not against a person having title. *Innkeeper v. Shields*, 345.

TRUSTS AND TRUSTEES.

Title by occupancy and use;—what? *Adverse possession; mixed possession;*—what? and how marked? *Ibid.*

A landlord cannot maintain trespass to land occupied by his tenant. *Tilghman v. Cruson*, 341.

A trust is not barred by limitation; but trusts repudiated for great length of time will be defeated. *Perkins v. Cartwell*, 270.

R. devised his estate to his brothers *in trust* to divide it equitably, agreeably to the law; but that his daughter *Mary* should receive no part of it whilst married to her then husband, nor her *minor* children; and in case of their death under age, that their share should "descend to the trustees" in fee; and in case all his *children* and *grandchildren* should die without leaving issue, then to the *trustees* discharged of the trust:—held, that children born after the will took, though *Mary* and her children died without issue under age. *Rodney's lessee v. Burton*, 183.

The persons appointed by an act of the legislature as managers to execute a lottery grant for the benefit of a college, &c., are not entitled to compensation for services, there being no such provision in the law, though they gave bond, and rendered important services to the state. *State v. Platt*, 154.

Such persons are not *public officers*, but *trustees*. *Ibid.*

A voluntary trustee is not entitled to compensation unless stipulated for; but only to have his *expenses* paid. *Ibid.*

A mere *trustee* cannot be attached as a garnishee. *Plunkett v. Le Huray*, 436.

A deed to A., B. and C., their heirs, &c., *in trust* for the grantors for life, and then for the use of grandchildren, conveys the legal estate, as *an executed use*, in the cestui que use; and is not a *trust estate* in the grantees. *Jones v. Bush et al.*, 1.

USE AND OCCUPATION.

Assumpsit for use and occupation will not lie against a person who entered into possession as a purchaser, though the contract of purchase be rescinded, and the premises recovered back in ejectment. *Mariner v. Burton's administrator*, 69.

Use and occupation will lie only by a landlord against a tenant. *Redden v. Barker*, 179.

A purchaser of land at sheriff's sale is entitled to rent from the day of sale. *Stayton v. Morris*, 224.

And has remedy by *distress* against the *tenant*. *Ibid.*

A purchaser at sheriff's sale may recover from any occupant of the land compensation for use and occupation. *Ibid.*

VARIANCE. (See PLEADING,) p. 173.

VERDICT.

The verdict in one action of trespass is conclusive between the same parties only of the fact and date of the trespass and the possession. *Stear v. Anderson*, 209.

Verdict set aside for error in calculating interest. 299.

The court will not set aside a verdict found on conflicting evidence, though they would have found otherwise. *Burton v. R. R. Co.*, 252.

Verdict set aside for the introduction of intoxicating liquor in the jury room. *Gregg's lessee v. M'Daniel*, 367.

VESSELS.

Vessels meeting must keep to the right, unless circumstances would render it improper. Having sufficient room, neither is bound to go out of the way to get on the right. *Steamboat Co. v. Whilldin*, 228.

A vessel having a fair wind must give way to one close hauled. *Ibid.*

A vessel on the starboard tack may keep her wind, one on the larboard must bear up, or go about. *Ibid.*

A vessel to windward must keep away to avoid collision. *Ibid.*

Steam vessels are regarded as having a wind. *Ibid.*

It is usual for vessels stemming tide to run in shore; with the tide, further out; and this usage will be considered on questions of collision. *Ibid.*

In case of collision of vessels the liability depends on the immediate causes. The gist is negligence, misconduct, or want of skill. *Cummins v. Spruance*, 315.

A vessel out of place is not to be run into with impunity if she may be avoided. *Ibid.*

Vessel owners are liable on the contracts of the master made in the usual course of business. *Wilson's administrator v. Marshall*, 64.

Vessels are bound to provide proper pilots, look-outs, lights, &c., and are responsible for accidents resulting from want of them. *Steamboat Co. v. Whilldin*, 228.

A part owner of a vessel, not master or ship's husband, cannot do repairs and sue his partners at law. *Redden v. Ellis*, 309.

A party may recover damages for a collision on the highway who may not have been entirely without fault, if he did not contribute directly to the collision. *Cummins v. Spruance*, 315.

No one has a right to obstruct a navigable stream, but the occasional grounding of a vessel is an obstruction incident to commerce, and not unlawful. *Ibid.*

Duck Creek, in Kent County, is a common highway for all vessels capable of navigating it. *Ibid.*

The law of the river. *Steamboat Co. v. Whilldin*, 228.

WAGER.

A wager on a horse-race out of the state is not illegal. *Ross v. Green*, 308.

WAIVER. (See PRACTICE,) p. 94.**WARRANTY.**

A declaration of the soundness of a horse by the seller is not a warranty. *Tyre v. Causey*, 425.

If wilfully false it is actionable in *cave* for deceit. *Ibid.*

Where there is a warranty it matters not whether the seller knew his statement to be untrue. *Ibid.*

WASTE. (See PLEADING,) p. 181.**WILLS.**

A bequest of personal property for *life*, without further limitation, is an *absolute gift*. *Pepper et ux. v. Warrington*, 55.

Personal property may be limited over after a bequest for life, by way of *executory bequest*. *Ibid.*

No limitation can be made of specific chattels, the use whereof consists in the consumption. *Ibid.*

WILLS.

An accidental omission will not destroy a will, though it disturb equality of division which the testator intended. *Hearn v. Ross*, 46.

A devise of residue of an *estate*, to be divided between wife and sisters "as the law directs," is but a *life estate* to the wife in the *realty*. *Burton v. Burton et al.*, 39.

A devise of "all my real and remainder of my estate," without any words of limitation, will carry a *fee*. *Donovan v. Donovan*, 177.

The word "estate" in a will, includes the interest as well as the corpus of the land. *Ibid.*

A devise to two grandsons "jointly, their heirs and assigns forever," is a tenancy in common, and not a joint tenancy in the devisees. *Davis et ux. v. Smith*, 68.

A will of lands held in common not revoked by acceptance of the whole under proceedings for partition. *Duffel's lessee v. Burton*, 290.

A will destroyed by the heir at law admitted to probate on proof of its contents by *one* witness, and rough drafts: the proof of execution being full. *Kearns v. Black*, 83.

The execution of a will by the testator's *mark* is a sufficient *signing* within the statute of wills. *Smith et ux. v. Dolby*, 350.

In a case of undoubted capacity, it need not be proved that the will was read over to or by the testator. *Ibid.*

The formal execution of a will is a publication. *Ibid.*

A will can be revoked only by substitution, or by cancelling, except in cases of implied revocation. *Ibid.*

A will cannot be explained by parol evidence unless there be a latent ambiguity. *Hearn v. Ross et al.*, 46.

A. by will divided his personal estate among children, and directed the shares to be paid "when they arrived to the age of maturity." His administrator c. t. a. gave bond more than *six* years before the youngest child came of age. An act of limitation was passed barring suits on such bonds in *six years from date*, saving infancy or coverture at the *accruing of the cause of action*; the action of the legatee brought on the bond within three years after full age, is not barred. *Layton v. The State*, 8.

R. devised his estate to his brothers in *trust* to divide it equitably, agreeably to the law; but that his daughter *Mary* should receive no part of it whilst married to her then husband, nor her *minor* children; and in case of their death under age, that their share should "descend to the trustees" in *fee*; and in case all his *children* and *grandchildren* should die without leaving issue, then to the *trustees* discharged of the trust:—*held*, that children born after the will took, though *Mary* and her children died without issue under age. *Rodney's lessee v. Burton*, 183.

WITNESS.

A judgment creditor, fully secured by lien on real estate of an intestate, is a competent witness for the administrator in an action to recover a debt due the intestate. *Faris' administrator v. Frazier*, 206.

An arbitrator is a competent witness to prove the grounds of award. *Allen v. Smith's administrator*, 234.

The court will not tax the costs of witnesses summoned to support others not examined. *Erittingham v. Collins et al.*, 298.

Corporation books:—when evidence. *Jefferson v. Stewart*, 82.

WITNESS.

A corporator is not a competent witness in an action between the company and a member. *Ibid.*

A colored person may prove his book of accounts in an action against a white man. *Webb v. Pindergarten's administrator*, 439.

A party may prove his books, whether kept by himself or by another. *Ibid.*

A witness may refresh his memory by a paper written at the time, but must swear from memory and not from the paper. *Redden v. Spruance et al.*, 217, 265.

A written memorandum may be used to refresh memory, but is not evidence *per se*. *Ibid.*, 217.

Witnesses' fees taxed at the term after trial. *Steans v. Anderson*, 209.

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